

STATE OF WISCONSIN  
IN SUPREME COURT  
Case No. 99-3095

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In the Interest of Kelsey C.R.,  
A Person Under the Age of 17:

STATE OF WISCONSIN,  
Petitioner-Respondent,

v.

KELSEY C.R.,  
Respondent-Appellant-Petitioner.

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ON A PETITION FROM A DECISION OF  
THE COURT OF APPEALS, DISTRICT I,  
AFFIRMING THE DENIAL OF A SUPPRESSION  
MOTION ENTERED IN THE CIRCUIT  
COURT OF MILWAUKEE COUNTY, THE  
HONORABLE M. JOSEPH DONALD, PRESIDING.

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BRIEF AND APPENDIX OF  
RESPONDENT-APPELLANT-PETITIONER

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BRIEF OF RESPONDENT-APPELLANT-PETITIONER

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**ISSUES PRESENTED**

1. DO OFFICERS HAVE A REASONABLE  
SUSPICION TO SEIZE A PERSON IF THEIR  
INITIAL CONCERN FOR THE PERSON'S  
SAFETY HAS BEEN DISPELLED?

The trial court answered: Yes.

The court of appeals answered: Yes.

2. PRIOR TO GIVING A TEENAGER A RIDE HOME IN A SQUAD CAR, CAN OFFICERS, AS A MATTER OF STANDARD PROCEDURE, SEARCH AN INDIVIDUAL WHERE THERE IS NO SUSPICION THAT SHE IS ARMED?

The trial court answered: Yes.

The court of appeals answered: Yes.

### **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

As in any case important enough to merit this court's review, both oral argument and publication are requested.

### **STATEMENT OF THE CASE**

On March 2, 1999, the state filed a petition alleging that Kelsey C.R. was delinquent because she was a child in possession of a dangerous weapon pursuant to Wis. Stat. § 948.60(2). (1). Kelsey denied the charge and filed a motion to suppress the evidence (10; 29). On May 10, 1999, the court held a hearing and denied the motion (32; App. 108). On June 3, 1999, Kelsey entered an admission to the charge. The court imposed a one-year dispositional order and placed Kelsey in her home (20; App. 109). Kelsey appealed. On May 2, 2000, the court of appeals affirmed the trial court's denial of the suppression motion (App. 101). On September 12, 2000, this Court granted Kelsey's petition for review.

### **STATEMENT OF FACTS**

On the evening of March 1, 1999, at 7:40 p.m., 15-year-old Kelsey sat on the well-lit sidewalk of Mitchell

Street in Milwaukee, leaning up against a storefront (32:6-8, 32). Curfew was not until 10 or 11 p.m. (32:26). Officer Bernard Gonzalez pulled up in an unmarked police car, rolled down his window, and asked Kelsey some questions. He did not recall if he identified himself as a police officer (32:17). Officer Gonzalez testified that he questioned Kelsey because he wanted to check on her welfare and to make sure that nothing was wrong (32:8).

Officer Gonzalez asked Kelsey if she was all right. Kelsey replied that she was. He asked how old she was. Kelsey said 15. He asked where she lived and, according to Gonzalez, Kelsey "kind of pointed with her right hand, said something like, over there in that area." He asked what she was doing. Kelsey answered that she was waiting for a friend (32:8).

Officer Gonzalez told Kelsey to "stay put" and he turned his squad car around. Kelsey got up and ran away. After a chase that lasted less than one minute, Officer Gonzalez and his partner, Officer Rivera, caught up to Kelsey. Kelsey asked the officers why they were bothering her (32:10-11).

Later, Officer Gonzalez testified that he decided to question Kelsey further because he "had his curiosity peaked (sic)." He said, "I didn't feel that a young 15-year-old female should be there alone." (32:9). Officer Gonzalez wondered if Kelsey might be a runaway based on her "evasive" answers. He explained, "Well, I decided to stop and talk to her further because in my mind, most people that would wait for a friend would be perhaps standing on the corner looking up and down the street waiting for the friend...." (32:9).

When the officers asked Kelsey why she ran, she told them that she was scared. The officers checked their computer and found that Kelsey was not a runaway. She gave the officers her phone number and they called Kelsey's mother. Her mother told the officers that she

knew Kelsey was out and that Kelsey was not missing. She "expressed surprise and disappointment that she ran from the police. She couldn't understand that." (32:28-29). Kelsey's mother asked them to bring her home (32:12-13). However, the officers planned to take Kelsey home even if her mother had not made that request.

Q: Whether mother asked you or not, you were going to take her home, whichever way; correct?

A: Yes, sir.

(32: 42).

Before driving Kelsey home, the officers called for a female officer to search Kelsey. Officer Gonzalez did not ask Kelsey's consent to do the search (32:37). Officer Gonzalez testified that he had Kelsey searched as a matter of "standard procedure" before he placed her in the squad car. (32:13).

Q: Now, your testimony is that the only reason you searched Kelsey was because her mother asked you to convey her home; correct?

A: Correct.

...

Q: Do you search everybody who goes in the back of your squad car?

A: Yes.

(32:36; App. 106).

Q: Now, you indicated you were going to have Kelsey frisked because she would have been put in a squad car, is that right?

A: Yes.

(32:39).

The officers decided to issue Kelsey a citation for obstructing but Officer Gonzalez could not recall when he actually wrote up the citation or when he made the decision to issue it (32:29-30). He testified that he

probably gave Kelsey the citation after she was at the police station (32:15).

The two officers and Kelsey waited twenty minutes for a female officer to arrive and conduct the search. Kelsey sat on the hood of the police car while she waited (32:47). Officer Gonzalez described Kelsey as "very cooperative." (32:16).

When Officer Traci Rogers arrived she did not ask Kelsey's consent to search but rather immediately began the pat down (32:13, 48). During the pat down, she felt a hard object in the front of Kelsey's jeans. She asked Kelsey what it was and Kelsey did not answer. Officer Rogers asked if she could take the object out and Kelsey put her head down, sighed, and said "yes" (32:46-47). The object was a small-caliber handgun (32:47).

Kelsey moved to suppress the handgun, arguing that there was no reasonable basis for the officers to stop or search her (10). After a hearing, the court denied the motion. The court found that the officers stopped Kelsey when they told her to stay put and they began to turn the squad car around (32:63). The officers had a basis to stop Kelsey in order to dispel their suspicion that Kelsey was a runaway (32:65). A contributing factor to the court's decision was the fact that Kelsey was in a dangerous neighborhood (32:64).

The court also held that the search was reasonable:

With respect to the frisk and search, police must have a reasonable suspicion that the person is armed and dangerous. The evidence in this motion doesn't necessarily support the suspicion that she was armed and dangerous, but the officer was just essentially doing good police work and concerned for his safety...

(32:66; App. 108).

For those reasons, the court denied the suppression motion.

The court of appeals affirmed the trial court. In its decision, the court of appeals offered several brief justifications for the stop: the police community caretaker function, the police statutory authority to take runaways into custody, and Kelsey's flight. *In the Interest of Kelsey C.R.*, No 99-3095, May 2, 2000, slip op. at 3; App. 103). It is not clear if it was a combination of these justifications or each standing alone that validated the stop.

The court also found that the search was proper. The court praised the officer's policy of searching every passenger prior to transport in the squad car, "in our view this is the only prudent practice." Slip op. at 4; App. 104. The court stated, "Our society is awash with illegal guns; the minimal intrusion of an outer-clothing frisk of someone about to ride in the back of a squad car is more than outweighed by the need to ensure the officers' safety." Slip op. at 4-5; App. 104-05. Thus the court of appeals affirmed the trial court's denial of the suppression motion.

## ARGUMENT

### **I. THE OFFICERS HAD NO REASONABLE ARTICULABLE BASIS TO SEIZE KELSEY AFTER SHE ANSWERED ALL OF THEIR QUESTIONS AND HER ANSWERS DISPELLED SUSPICION THAT SHE WAS A RUNAWAY OR WAS IN NEED OF ASSISTANCE.**

At 7:40 p.m., on March 1, 1999, Officer Gonzalez saw Kelsey sitting on a well-lit sidewalk and leaning up against a building. Officer Gonzalez asked Kelsey if she was all right and she said she was. He asked her how old

she was and Kelsey replied that she was 15. He asked where she lived and Kelsey pointed. He asked what she was doing and Kelsey explained that she was waiting for a friend (32:8, 32). Despite the fact that this questioning should have alleviated concerns for Kelsey's safety, Officer Gonzalez told her to "stay put" and turned his squad car around (32:10).

The trial court held that when the officer told Kelsey to "stay put" a seizure occurred for Fourth Amendment purposes:

Q: Judge, are you making a finding that there were two stops?

A: There were two stops. The initial detention, questioning of the juvenile to dispel the suspicion as to whether or not she was a runaway. Second stop is the apprehension after the juvenile takes flight from the police.

(32:67). On appeal, Kelsey is only contesting the legality of that first stop.

In reviewing an order denying the suppression of evidence, this court will affirm a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Whether the stop is constitutional is a question of law that this court reviews de novo. *State v. King*, 175 Wis. 2d 146, 150, 499 N.W.2d 190 (Ct. App. 1993).

The court of appeals articulated four justifications for the stop: (1) community caretaker, (2) statutory authority to take a runaway into custody, (3) a *Terry* stop supported by reasonable suspicion and (4) Kelsey's flight from the officers. *State v. Kelsey C.R.*, Slip op. at 3-4; App. 103-04. Standing alone or in combination, these justifications do not support the stop because under each analysis the stop is unreasonable.

The validity of any of these justifications turns on the issue of reasonableness. "The ultimate standard under the fourth amendment is the reasonableness of the search or seizure in light of the facts and circumstances of the case." *State v. Anderson*, 142 Wis. 2d 162, 168, 417 N.W.2d 162 (Ct. App. 1987), *reversed on other grounds* 155 Wis. 2d 77, 454 N.W.2d 763 (1990).

In order to justify a stop pursuant to *Terry v. Ohio*, an officer must reasonably suspect that some criminal activity is taking or has taken place. *Terry v. Ohio*, 391 U.S. 1, 30 (1968). *See also*, Wis. Stat. § 968.24.

In the *Terry* context, reasonableness of a stop turns on one control fact. Pursuant to *Terry*, the officer must reasonably suspect that some *criminal* activity is taking or has taken place. *Terry v. Ohio*, 391 U.S. 1, 30 (1968) (emphasis added). Officer Gonzalez did not suspect that any criminal activity was taking or had taken place. Officer Gonzalez testified that he decided to stop Kelsey based upon his hunch that she might be a runaway (32:9). Being a runaway is not a crime. Because the officer did not stop Kelsey based on a reasonable suspicion that some criminal activity was taking place, the stop is not reasonable pursuant to *Terry*.

As the court of appeals correctly noted, officers have a statutory authority to take runaways into custody. Wis. Stat. §938.19(1)(d)4. But this is not an open-ended authority. The statute requires that the officer must have "reasonable grounds" to believe the child has run away. Wis. Stat. §938.19(1)(d)4. Officer Gonzalez did not have reasonable grounds to suspect that Kelsey was a runaway.

The officer based his hunch that Kelsey might be a runaway on three facts: first "because in my mind, most people that would wait for a friend would be perhaps standing on the corner looking up and down the street waiting for the friend...." Second, "based on her evasive answers." And finally, "the fact that she was in an area,

Eighth and Mitchell, that is not what I would consider to be a good area especially at night. I didn't feel that a young 15-year-old female should be there alone" (32:9). These observations do not add up to a reasonable grounds to suspect that Kelsey was a runaway.

Reviewing each of the facts Officer Gonzalez found suspicious, it becomes clear that it was simply "conduct that large numbers of innocent citizens engage in every day for wholly innocent purposes." *State v. Young*, 212 Wis. 2d 417, 429-30, 569 N.W.2d 84 (Ct. App. 1997). Officer Gonzalez claimed that he was suspicious because Kelsey was sitting and waiting for a friend rather than standing (32:9). It's easy to imagine reasons why someone would choose to sit and wait rather than stand. Perhaps Kelsey was early and knew her friend wouldn't arrive for a while. Perhaps Kelsey was tired or bored. Perhaps Kelsey was not concerned that her friend would drive by or walk by quickly and not see her.

Regarding the second supposedly suspicious factor, Kelsey's answers cannot rationally be viewed as evasive (32:9). Kelsey, without hesitation, answered every question the officer put to her. Each answer she gave was reasonable and should have dispelled, rather than increased, suspicion. Kelsey assured the officer that she was okay. She told him her age. She told him where she lived. She gave a plausible reason why she was sitting there (32:8). The officer did not and could not specifically identify which answer was evasive, because none was.

Finally, the officer testified that he was suspicious because "It's not a good neighborhood for a young girl her age to be sitting...It's not a place for a young girl to be out alone, especially after dark" (32:41). This may have been a well-intended paternalistic reaction, but that is different from reasonable suspicion supporting a seizure and search. As the United States Supreme Court held in *Brown v. Texas*, 443 U.S. 47 (1979), "The fact

that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct.” *Id.* at 52. Likewise, the fact that a girl is alone in a “bad” neighborhood should not cast suspicion upon her.

If the officer’s concern for a girl being in this particular neighborhood could validate a stop, then no girl could walk alone in this neighborhood, even if she lived there. Every young person would be subject to a police stop because of officer’s concern for their safety. Officer Gonzalez testimony seemed focused on the fact that Kelsey is a girl, so the question remains whether the officer would have stopped a boy who was sitting on the sidewalk.

Justifying the stop on the community caretaker function runs into many of the same factual problems as the statutory authority analysis. The court must make three determinations in order for the community caretaker justification to apply. *State v. Anderson*, 142 Wis.2d at 169. First, the court must find that a Fourth Amendment seizure took place. The trial court here made that specific finding (32:67). Second, the court must determine whether the officer’s conduct was bona fide community caretaker activity. This means that the officer’s activity must not be related to the investigation of a crime. The officer stopped Kelsey because he thought she was a runaway so it was bona fide community caretaker activity. Third, the public need and interest must outweigh the intrusion on the privacy of the individual. Investigating a possible runaway does involve a legitimate public interest. However, it is not a violation of the law, “[a]s such, it necessarily falls on the low end of the ‘public interest’ and ‘exigency’ scale.” *State v. Anderson*, 149 Wis.2d 663, 681, 439 N.W.2d 840 (Ct. App. 1989)(Anderson II), *overruled on other grounds in State v. Anderson*, 155 Wis.2d 77, 454 N.W.2d 763 (1990).

Another consideration relevant to this balancing test is “the availability, feasibility and effectiveness of alternatives” to the intrusion. *State v. Anderson*, 142 Wis. 2d at 170. Officer Gonzalez could easily have addressed his concerns by means short of a stop simply by asking a few more questions. If alternative means of investigation are available, “the reasonableness of the stop based on scant facts may well be questionable.” *State v. Guzy*, 139 Wis. 2d 663, 677-78, 407 N.W.2d 548, reconsideration denied 145 Wis. 2d 894, 434 N.W.2d 786, cert. denied, 484 U.S. 979 (1987). Kelsey and the officer were engaged in a conversation and Kelsey was appropriately answering all of his questions. This conversation could have continued. The officer could have obtained more information, such as Kelsey’s address, her friend’s name, when her friend was going to pick her up, why she was sitting rather than standing. If he was motivated by a concern for her safety in that neighborhood, he could have simply continued to patrol the area or even parked his squad car to be sure that Kelsey received her ride or was not bothered.

Another consideration is the “attendant circumstances surrounding the seizure.” *State v. Anderson*, 142 Wis. 2d at 169. As is set out above in the discussion establishing why there were no “reasonable grounds” to believe that Kelsey was a runaway, the circumstances in this case do not support a stop. The circumstances show that the stop was unreasonable. First, it was 7:40 p.m. This was well before curfew and not a time of the night when it would be unusual for a teenager to be outside. The officers were in the neighborhood on a graffiti patrol and had no reports of a runaway (32:6). Further, the officer could not identify anything specific about the questions and answers that raised his suspicion to the level where it would justify a stop. As the United States Supreme Court stated in *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999), “an individual’s decision to remain in a public place of his choice is as

much a part of his liberty as the freedom of movement..." If the facts at bar create a reasonable grounds, then this is an illusory standard.

An officer's good intentions are not enough to support a stop. Otherwise, an officer could seize anyone who looked sad, lost or confused. As the court observed in *U.S. v. Buenaventura Ariza*, 615 F.2d 29 (1980):

...if undue reliance is placed upon an agent's 'perception' or 'interpretation' of observed conduct, then the requirement of specific, objective facts may easily be circumvented.

615 F.2d 36-37.

Officer Gonzalez acted on nothing more than a hunch about Kelsey's status that was not supported by the facts. The attendant circumstances did not provide the officer with sufficient facts to conclude that Kelsey was a runaway.

Finally, the trial court specifically held that one stop took place before Kelsey ran away and a second stop took place after she ran (32:67). Because the initial stop took place before Kelsey ran, the fact that Kelsey fled is not relevant to and is not a proper justification for the initial stop. Thus the court of appeals erred when it used the fact of Kelsey's flight as support for the legality of the stop.

Because the stop was illegal, all of the evidence derived from the initial illegal stop must be suppressed. The exclusionary rule bars evidence that was obtained as a direct result of illegal police conduct "knowledge gained by the Government's own wrong cannot be used..." *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). If it were not for the illegal stop, Kelsey would not have run and would not have been searched. Thus the gun must be suppressed.

**II. WITHOUT A WARRANT OR ANY APPLICABLE EXCEPTION TO THE WARRANT REQUIREMENT, IT VIOLATED THE FOURTH AMENDMENT TO PAT DOWN KELSEY PURSUANT TO THE OFFICER'S BLANKET POLICY OF SEARCHING EVERY PERSON HE PLACES IN HIS SQUAD CAR.**

**A. Introduction And Standard Of Review.**

Kelsey contends that because the stop was improper, all the evidence seized as a result of the search must be suppressed. However, if this court finds that the police did make a legal stop, Kelsey argues that the evidence must still be suppressed because the pat-down search was not reasonable.

Both the Fourth Amendment to the United States Constitution and art. I, sec. 11 of the Wisconsin Constitution guarantee citizens the right to be free from "unreasonable searches and seizures." Like the analysis of the stop, this court will affirm the trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence but the question of whether the search was constitutional is a question of law that this court reviews de novo. *State v. Richardson*, 156 Wis. 2d at 137.

A pat down for weapons is a search. In order to conduct a search, the officer must have a warrant or an exception to the warrant requirement must apply. *Terry v. Ohio*, 392 U.S. at 21. As shown below, there was neither a warrant nor an exception in this case. The pat down search was conducted pursuant to the officer's blanket policy of searching everyone who was placed in the squad car. Such a blanket rule is inconsistent with the Fourth Amendment.

**B. The Search Was Not Reasonable And Does Not Fall Under Any Of The Exceptions To The Warrant Requirement.**

There are several exceptions to the warrant requirement and the distinctions between them often blur. However, the one common thread in all the exceptions is the underlying requirement of reasonableness, "These exceptions are not inherently different in character; rather, each presents a means by which the reasonableness of a given search and seizure may be assessed and described." *State v. Milashoski*, 159 Wis. 2d 99, 464 N.W.2d 21 (Ct. App. 1990) *affirmed* 163 Wis. 2d 72, 471 N.W.2d 42 (1991).

There are a few obvious exceptions that may be offered to sustain the search in this case but none of them can justify the search on these facts.

First, this was not a consent search. Officer Gonzalez acknowledged that he did not ask Kelsey for consent. The district attorney asked, "To your knowledge, did anybody ask Kelsey whether she consented to being searched?" and the officer answered, "I did not ask her." (32:37). Likewise, the female officer who conducted the search testified that as soon as she arrived on the scene she began to search Kelsey, "I rolled up and saw the female and knew that she's the only female there, and I asked her to turn around and started searching her." (32:48). There was no consent to search.

Another exception is the search incident to a lawful arrest. This does not apply because Kelsey was not under arrest (32:66). "For a search incident to an arrest to be valid, there must be an actual arrest." *State v. Pallone*, 236 Wis. 2d 162, 176, 613 N.W.2d 568 (2000), 2000 WI 77, ¶43; *see also*, *State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991).

The officer's testimony and the trial court's findings of fact preclude a finding that this was valid frisk pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). Pursuant to *Terry*, an officer may conduct a limited pat down for weapons if, based on the totality of the circumstances, there is reasonable suspicion that the suspect may be armed and dangerous. *State v. Morgan*, 197 Wis. 2d 200, 209, 539 N.W.2d 887 (1995).

The reasonable suspicion must be based on specific and articulable facts and inferences that reasonably support the search. "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry v. Ohio*, 392 U.S. at 27.

The officer admitted that he had Kelsey searched as a matter of routine rather than because he had any particularized reason to suspect that she might be armed:

Q: Now, your testimony is that the only reason you searched Kelsey was because her mother asked you to convey her home; correct?

A: Correct.

(32:36; App. 106).

Q: Now, you indicated you were going to have Kelsey frisked because she would have been put in a squad car; is that right?

A: Yes.

(32:39).

Officer Gonzalez testified that the search is "standard procedure before conveying anybody." (32:13).

Further, there is no evidence in the record suggesting that a reasonable officer would suspect that Kelsey was armed. In *Morgan*, this court set out several factors relevant to a determination of whether reasonable

suspicion exists. First, the court considered the time of the stop. In *Morgan*, the court noted that the stop was at 4 a.m. and that time created a more suspicious situation. 197 Wis. 2d at 214. However, the stop and search in Kelsey's case were not in the middle of the night. The officers began to question Kelsey at 7:40 p.m., well before even the local curfew of 10 or 11 p.m. (32:6-8, 26).

The court in *Morgan* also found that it was significant that the suspect acted nervous. *Id.* at 215. In Kelsey's case, the officer specifically testified that at least at the time of the questioning Kelsey was not agitated or overly nervous (32:43). In fact, he described Kelsey as "very cooperative." (32:16). Nothing in the record indicates that Kelsey acted nervous prior to the search.

The trial court in Kelsey's case did find that the stop and search occurred in a high-crime neighborhood (32:64). However, location in a high-crime neighborhood alone is not a factor sufficient to justify a stop or search. *Morgan*, 197 Wis. 2d at 212. Also, the issue of the high-crime neighborhood was focused on Kelsey's safety, not any threat posed to the officers or others (32:41).

The facts leading up to the search belie any claim that there was a reasonable suspicion that Kelsey was armed or dangerous. Kelsey and the two officers waited 20 minutes without incident for the female officer to arrive (32:13). Officer Gonzalez described Kelsey as "very cooperative" (32:16). The situation was so relaxed that when the female officer arrived Kelsey was sitting on the hood of the squad car (32:47). Finally, the officer based the stop on a concern for Kelsey's welfare and not for an investigation of a crime or any indication that Kelsey posed a threat to others (32:41).

In the face of these overwhelming facts, the trial court recognized that the officer did not have a reasonable suspicion that Kelsey was armed:

With respect to the frisk and search, police must have a reasonable suspicion that the person is armed and dangerous. The evidence in this motion doesn't necessarily support the suspicion that she was armed and dangerous, but the officer was just essentially doing good police work and concerned for his safety...

(32:66; App. 108).

Another exception to the warrant requirement is the community caretaker exception. One significant fact removes this search from the community caretaker exception: at the time of the search, Officer Gonzalez had decided to issue Kelsey a citation for resisting and obstructing (32:13).

The facts in *State v. Dull*, 211 Wis. 2d 652, 565 N.W.2d 575 (Ct. App. 1997), are similar to those in this case. In *Dull*, officers responded to a noise complaint. When they arrived, they encountered a juvenile boy outside who smelled of alcohol. A breath test confirmed that he had been drinking and the officers asked the boy if there was an adult in the house with whom he could be left with. Only a 21-year-old brother was home. An officer entered the home and discovered the brother in bed with a juvenile girl. *Id.* at 654-55.

The court found that the community caretaker rationale did not justify the entry into the home because the officer's "role as a community caretaker ended when he determined that Matthew was intoxicated and took him into custody...At this point, the deputy returned to his traditional role; he was enforcing the state's beverage control laws." *Id.* at 658.

Likewise, Officer Gonzalez' community caretaker role ended when he decided to issue Kelsey the citation

for resisting/obstructing.<sup>1</sup> At that point the search was no longer “divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” *Cady v. Dombrowski*, 413 U.S. 433 (1973).

Further, as the court in *State v. Anderson*, 142 Wis. 2d at 167, noted, “[r]ecognizing that police conduct can fall within the community caretaker function, however, does not always place it beyond constitutional scrutiny... The ultimate standard under the fourth Amendment is the reasonableness of the search or seizure in light of the facts and circumstances of the case.” *Id.* at 168.

The pat-down search of Kelsey was not reasonable. “In order to determine whether a search is reasonable, we balance the need for the search against the invasion the search entails.” *State v. Guy*, 172 Wis. 2d 86, 93, 492 N.W.2d 311 (1992).

Turning first to the need for the search, the record is clear that Kelsey was searched because she was going to be placed in the squad car (32:36). In analyzing whether this search was needed, it is logical to consider whether there were other alternatives available to the officer. Part of the reasonableness analysis involves considering “the availability, feasibility and effectiveness of alternatives” to the search. *Anderson* 142 Wis. 2d at 170.

The officer did not have to drive Kelsey home. If a child is 15 years old or older, as was Kelsey, the statutes specifically provide that an officer “may release the juvenile without immediate adult supervision after

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<sup>1</sup> Deciding to issue a citation, however, does not mean that the person is under arrest, “we refuse to adopt an exception to warrantless searches based solely on the existence of probable cause.” *State v. Swanson*, 164 Wis. 2d 444.

counseling or warning the juvenile as may be appropriate." Sec. 938.20(c).

The officer explained the various options he had prior to the search:

As a matter of policy, we have the option of issuing a citation there on the scene or taking the individual into custody, taking them to District 2 and issuing them the citation or returning them to their parents. In this particular case whether I took her to District 2 or not, I already knew I was going to be taking her home to her mother. The case of juveniles – That is also a third option is also doing just that, conveying them home; issuing the citation and turning them over to their parents. So it's hard to say typically with juveniles, especially because there's so many different factors; depends upon the circumstances.

(32:28).

If an officer decides to take the person home, the most obvious way to avoid the illegal search issue is by simply asking the person if they want a ride and explaining that if they do, they will be subjected to a search. See *People v. Scott*, 546 P.2d 327, 333 (Cal. 1976)(pat down prior to placement in squad car is permissible if officer informs person that he has a right to refuse ride but if he accepts ride he will be subjected to a search). Interestingly, Officer Gonzalez testified that this is his usual policy but the record does not reveal why it did not occur in this case.

Well, we – everybody who goes in the back of my squad car, I will conduct a search, whether it be a pat-down or full custody search. If they're in custody, I will perform a custodial search. If they're not, I will ask their permission to perform a pat-down search for weapons that might be used against us. Typically in those cases when they deny a consent, then I will not put them in the back of my squad. We will find other ways to do things.

(32:36-37).

In addition to simply asking for consent, there are, as Officer Gonzalez stated, "other ways to do things." (32:37). In this case, the officer had Kelsey's mother on the phone. He could have asked her to pick Kelsey up. If this was not possible, he could have inquired whether a friend or relative could come and get Kelsey. The officer could have asked Kelsey if she could call a friend to pick her up. The officers could have walked Kelsey home. They could have followed her in the squad car as she walked home. Faced with all of these obvious alternatives, it is clear that there was no compelling need for this search.

The other prong of the *Terry* reasonableness balancing test is the invasion that the search entails. *State v. Guy*, 172 Wis. 2d at 93. In *Terry*, the court described a pat down search as "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." The court went on to say, "Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Terry v. Ohio*, 392 U.S. at 17, 25.

With the alternatives available to the officer and the utter lack of a reasonable suspicion that Kelsey was armed and dangerous the search in this case was a violation of the Fourth Amendment protection against unreasonable searches and seizures.

**C. A Blanket Rule Permitting A Pat-Down Search Of Every Person Who Is Placed In A Squad Car Significantly Erodes Terry And The Protections In The Fourth Amendment.**

Because no exception to the warrant requirement applies and because this search was unreasonable under

*Terry*, the only way this search can be justified is if there is a blanket exception to the Fourth Amendment when a person is placed in the back of a squad car. No state has adopted such a rule and this court specifically declined to formulate an exception in *State v. Morgan*, 197 Wis. 2d at 215 (case was resolved on settled Fourth Amendment law).

However, the trial court and court of appeals decisions rest squarely on the adoption of a blanket rule permitting searches on this basis. The trial court held, "The evidence in this motion doesn't necessarily support the suspicion that she was armed and dangerous, but the officer was just essentially doing good police work...." (32:66; App. 108).

The court of appeals was more direct. It held:

Concerned for their safety with a passenger in the back seat, the officers had a female officer check to see if Kelsey was armed. In fact, Officer Gonzalez testified that it is his routine practice. In our view this is the only routine practice. (citations omitted) Simply put, a "reasonably prudent" police officer would want to make certain that the person in the back seat is not armed. (citation omitted). Our society is awash with illegal guns; the minimal intrusion of an outer-clothing frisk of someone about to ride in the back of a squad car is more than outweighed by the need to ensure the officers' safety.

Slip op. at 4-5; App. 104-05.

Many states have addressed the issue of a search prior to transport in a squad car. Not one has gone so far as to set out a blanket rule permitting officers to search every person before placing him or her in the squad car.

The Minnesota Supreme Court expressly rejected the blanket rule in *State v. Varnado*, 582 N.W.2d 886 (Minn. 1998). In *Varnado*, police stopped a woman's car

because it had a cracked windshield. The stop occurred in an apartment complex known for drug dealing. When the woman told officers that she did not have her license with her, the officers frisked her before placing her in the squad car. At the suppression hearing, the officer testified that he always frisked people before placing them in the back of his squad car. *Id.* at 888.

The state asked the court to adopt a blanket rule allowing officers to require lawfully stopped citizens to submit to a frisk before placing them in the squad car. First, the court noted that the officer had alternatives to placing the defendant in the squad car and thus had no reasonable basis for forcing her to sit in the back of the car. *Id.* at 890. Then, the court explicitly and eloquently set out its reasons for rejecting the proposed blanket rule.

The court held that it would “not allow officers to contravene the reasonableness requirement of the Fourth Amendment simply by requesting that a person sit in the squad car.” The court went on to explain why such a policy would be contrary to *Terry*:

[S]uch an application would circumvent *Terry*. *Terry* requires that a frisk pursuant to a lawful stop be based on a reasonable belief that the person may be armed and dangerous. (citation omitted) Under the state’s proposed rule, however, no articulable suspicion would be necessary for a frisk. Any stop for a minor traffic violation when the driver does not have a driver’s license with them would ultimately provide sufficient cause for a frisk because an officer would merely have to request that a stopped person wait in the squad car during the license check. Such a procedure would essentially eliminate any Fourth Amendment protection against unreasonable searches in traffic stops.

*Id.* at 891.

On a federal level, the Eighth Circuit has also expressly rejected a blanket rule. In *U.S. v. Glenn*, 152

F.3d 1047 (8<sup>th</sup> Cir. 1998), the officer told the driver to sit in the back of the squad car while the officer did a license check. The officer testified that he searched the defendant because it was his routine practice prior to placing someone in the squad car. The government argued that the pat down was justified because deciding to put someone in the back of a squad car placed the officer in a vulnerable position. The court rejected this claim, holding:

The Government's argument is contrary to Terry's reasonable suspicion requirement and would permit law enforcement officers to pat down all traffic offenders simply by choosing to place them in the back seat of patrol cars during traffic stops. An officer's decision to place a traffic offender in the back of a patrol car does not create a reasonable, articulable suspicion to justify a pat-down search that the circumstances would not otherwise allow.

*Id.* at 1049.

The California Supreme Court also refused to permit a search every time a person was placed in a squad car. *People v. Scott*, 546 P.2d 327 (Cal. 1976). *Scott* presented a situation similar to Kelsey's, where the officers had no duty to transport the person home in the squad car but chose to do so anyway. In *Scott*, the officers encountered an intoxicated man and decided to drive him to his destination in their squad car. The court acknowledged the good intent of the officers and the dilemma they faced in these situations. The court then created a simple rule,

[I]n order for a pat-down search to be valid under these or similar circumstances the officer must first inform the individual that he has a right to refuse the ride but if he accepts it he will be subjected to a pat-down search for weapons. Such a brief admonition will protect both the officer's safety and the individual's right to decide for himself whether he is willing to undergo a pat-down search in order to obtain the offered assistance of

the police. No adverse inference may be drawn, of course, if he chooses to preserve his personal privacy.

*Id.* at 250.

Other states have followed the reasoning of only permitting the searches when the officer is required to put the person in the squad car or when the officer has given the person a choice of whether or not to accept a ride in the squad car. For example, in *People v. Otto*, 284 N.W.2d 273 (Mich. Ct. App. 1979), an officer stopped a person who was illegally hitchhiking on a freeway. The officer intended to put the person in the squad car and drive him to a road where he could legally hitchhike. The court noted that if the officer left the hitchhiker on the road he would have continued to violate the law against walking along the freeway. Therefore, the officer placed the person in the car to avoid a continuing law violation. *Id.* at 276.

In another Michigan court of appeals case, *People v. Hannaford*, 421 N.W.2d 608 (Mich. Ct. App. 1988), some passengers were stranded after the driver was arrested for drunk driving. None of the passengers had a license, so the officer offered them the option of walking to a nearby restaurant or accepting a ride in the squad car. They chose the squad car. The court justified the search on the basis that the passengers chose to accept the ride. Further, the officer testified that he did not search everyone he placed in the squad car but that he did in this case due to the intoxication, the late hour and the fact that the officer was alone and outnumbered by the passengers. *Id.* at 610. See also *Williams v. State*, 403 So.2d 453 (Fla. Ct. App. 1981)(defendant voluntarily agreed to ride in the squad car and defendant was a suspect in a brutal rape involving a weapon; *State v. Lombardi*, 727 A.2d 670 (R.I. 1999), (search permissible because defendant was highly intoxicated, did not object to riding in squad car, 2:30 a.m., no other means to get home, too far to

walk and no place nearby where defendant could call for a ride); *Byrd v. State*, 458 A.2d 23 (Del. 1983)(police investigating a crime, intended to drive defendant to the crime scene); *Commonwealth v. Rehmeier*, 502 A.2d 1332 (Pa. Super. Ct. 1985)(search justified on Pennsylvania law that if probable cause to arrest exists officer may search), contrary to Wisconsin law set forth in *State v. Swanson*, 164 Wis. 2d 437; *Commonwealth v. Bedsaul*, 444 A.2d 717 (Pa. Super. Ct. 1982)(search justified because defendant requested ride in squad car); *State v. Vasquez*, 807 P.2d 520 (Ariz. 1991)(2 a.m. domestic dispute involving alcohol, officers decide to drive defendant home, he says he is cold so officers offer him his jacket, defendant is advised that the officers will search the jacket before he is placed in squad car and he does not object).

The state that goes the farthest in permitting searches prior to transport is Ohio, but even there the state supreme court stopped short of adopting a blanket rule. In *State v. Evans*, 618 N.E.2d 162 (Ohio 1993), officers stopped a car in the early morning because it had a headlight out. While questioning the driver, who did not have a license, the officers received a dispatch describing a person who had just made a drug transaction. The driver matched the description. The court upheld the search, but the drug information clearly impacted the decision, "a routine and innocuous stop for an equipment violation turned into a situation fraught with danger." *Id.* at 169. Thus the analysis falls back to the overall reasonableness analysis rather than a blanket rule. Further, a later Ohio case illustrates that *Evans* should not be read too broadly. In *Village of Pemberville v. Hale*, 709 N.E.2d 227 (Ohio App. 1998), the driver was arrested and his car towed. The passenger was told to ride in the squad car and was subjected to a pat down. The court held that the search was improper, noting that "appellant at that point should have had the option of accepting the ride-and-search or declining both." *Id.* at 632.

In addition to the facts that a blanket rule would violate United States Supreme Court precedent and no other jurisdiction had approved a blanket rule, there are strong policy reasons supporting continuing with the reasonableness analysis. Such a rule would essentially eliminate any Fourth Amendment protection against unreasonable searches as long as the officer decides to place the person in the squad car. The potential for abuse is ripe: virtually any stop could turn into a search.

The United States Supreme Court addressed similar concerns when it struck down Wisconsin's blanket rule permitting no-knock searches in drug cases,

But creating exceptions to the knock-and-announce rule based on the 'culture' surrounding a general category of criminal behavior presents at least two serious concerns. First, the exception contains considerable overgeneralization. For example, while drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree...A second difficulty with permitting a criminal-category exception to the knock-and-announce requirement is that the reasons for creating an exception in one category can, relatively easily, be applied to others.

*Richards v. Wisconsin*, 520 U.S. 385, 392-93 (1997).

Likewise, the Supreme Court in *Maryland v. Buie*, 494 U.S. 325, 333 (1990), cautioned against departing from the Fourth Amendment reasonableness test even in dangerous police situations. As these cases point out, the danger is that replacing the reasonableness requirement with a blanket rule undercuts the purpose and intent of the Fourth Amendment and can have consequences more far reaching than the court or the parties can anticipate.

The current reasonableness standard is clear and it is working. If a person is under arrest, he can be searched. If an officer reasonably believes a person is

armed and dangerous, he can be searched. If the person consents, he can be searched. Officers have a broad range of protective options available to them before they decide to put a person in the squad car. And, if there is no reasonable basis to pat the person down then the officer can always avoid the potentially dangerous situation by not placing the person in the squad car.

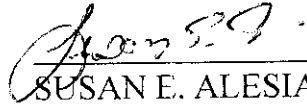
Short of adopting a blanket policy allowing a search whenever a person is put in a squad car, the only workable analysis for this case is the reasonableness analysis set forth in *Terry*. As discussed above, there was no reasonable basis for the search in this case and therefore it violated the Fourth Amendment and art. I sec. 11. The evidence found as a result of the illegal search should be suppressed.

### CONCLUSION

Because the officers lacked reasonable suspicion to stop Kelsey, the seizure of the evidence after the stop was improper and the trial court's denial of the motion to suppress should be reversed. In the alternative, the evidence should be suppressed because the search was not reasonable, did not fit under any of the exceptions to the warrant requirement and a blanket rule in Wisconsin permitting searches prior to transport in squad cars violates the state and federal constitutions.

Dated this 8<sup>th</sup> day of November, 2000.

Respectfully submitted,



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## CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 7,658 words.

Dated this 8<sup>th</sup> day of November, 2000.

Signed:



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# **A P P E N D I X**

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SEA

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 2, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-3095

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**IN THE INTEREST OF KELSEY C.R., A PERSON UNDER  
THE AGE OF 17:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**KELSEY C.R.,**

**RESPONDENT-APPELLANT.**

**RECEIVED**  
MAY 02 2000  
STATE PUBLIC DEFENDER  
MADISON APPELLATE

APPEAL from an order of the circuit court for Milwaukee County:  
M. JOSEPH DONALD, Judge. *Affirmed.*

¶1 FINE, J. Kelsey C.R. appeals from a dispositional order entered on her admission to the charge of illegal possession of a firearm by a person under the age of eighteen. See WIS. STAT. § 948.60(2)(a). She claims that the trial court erroneously denied her suppression motion. We affirm.

## I.

¶2 Milwaukee police officer Bernard Gonzalez testified that on March 1, 1999, at around 7:40 p.m., he was in his squad car with his partner when he saw “a female juvenile” sitting on the sidewalk with her back resting against a building. It was dark out. The girl was Kelsey C.R.

¶3 The officers stopped the car, rolled down their window, and asked her if she was all right. She replied that she was, and, in response to their question, told them that she was fifteen years old. She also told the officers that she lived nearby and was waiting for a friend. Concerned that she might be a runaway, the officer wanted to “talk to her further.”

¶4 The officer told her to “stay put,” and turned the squad around. Kelsey then ran. After a substantial chase, which lasted some “[t]hirty to forty seconds,” the officers stopped her. The officers checked her on the department computer; she was not a runaway. They asked for her telephone number, which she gave them, and they called her home. Officer Gonzalez spoke to Kelsey’s mother, who “asked me to bring her home.” The officer would have taken her home whether the mother had asked him to do so or not.

¶5 Officer Gonzalez told the trial court that he will not put anyone in his squad car before making certain that the person is not armed. Accordingly, he asked a female police officer to meet them to do a pat-down search of Kelsey. Twenty minutes after he called for the female officer, she arrived. She patted Kelsey’s outer clothing, felt a hard object in Kelsey’s pocket. It was a small loaded handgun.

## II.

¶6 Whether an investigatory stop was legally justified presents a question of law that we decide *de novo*. See *State v. Krier*, 165 Wis. 2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991). The facts essential to this determination here are not disputed.

¶7 Police officers have a community-caretaker function. *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411, 414 (Ct. App. 1987), *rev'd on other grounds*, 155 Wis. 2d 77, 454 N.W.2d 763 (1990). Persons under the age of eighteen may be taken into custody by a law-enforcement officer if they are runaways. See WIS. STAT. §§ 48.19(1)(d)4; 48.02(2); 938.19(1)(d)4; & 938.02(10m). An officer who believes that a person under the age of eighteen may be a runaway has the right to investigate. See *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (“police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.”).<sup>1</sup> The officers’ investigation here, however, was cut short when Kelsey fled, which permitted them to chase and physically stop her. See *Illinois v. Wardlow*, 120 S. Ct. 673, 676 (2000) (flight warrants further investigation); *Anderson*, 155 Wis. 2d at 86-87, 454 N.W.2d at 767 (“proper balance” under Fourth Amendment permits

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*Terry* [v. *Ohio*, 392 U.S. 1 (1968),] accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further.

*Illinois v. Wardlow*, 120 S. Ct. 673, 677 (2000).

temporary stop of person “engaging in flight upon sighting law enforcement officers”). Although Officer Gonzalez told the trial court that he would have taken Kelsey home whether her mother had asked him to do so or not, Kelsey’s mother *did* ask him to bring Kelsey home. Cf. WIS. STAT. §§ 48.20(2)(ag) (“Except as provided in pars. (b) to (d), a person taking a child into custody shall make every effort to release the child immediately to the child’s parent, guardian or legal custodian.”); 938.20(2)(ag) (“Except as provided in pars. (b) to (g), a person taking a juvenile into custody shall make every effort to release the juvenile immediately to the juvenile’s parent, guardian or legal custodian.”).<sup>2</sup>

¶8 Concerned for their safety with a passenger in the back seat, the officers had a female officer check to see if Kelsey was armed. In fact, Officer Gonzalez testified that it is his routine practice. In our view this is the only prudent practice. Cf. *State v. Swanson*, 164 Wis. 2d 437, 442, 475 N.W.2d 148, 150 (1991) (routine practice to do a pat-down frisk for weapons of anyone placed in a squad car; lawfulness not decided). Simply put, a “reasonably prudent” police officer would want to make certain that the person in the back seat is not armed. See *Terry*, 392 U.S. at 27 (“The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.”). Our society is awash with illegal guns; the minimal intrusion of an

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<sup>2</sup> Thus, we do not decide whether the result of this case would be different if Kelsey’s mother had not asked the officer to bring Kelsey home. See WIS. STAT. §§ 48.20(2)(c) (“If the child is 15 years of age or older, the person who took the child into custody may release the child without immediate adult supervision after counseling or warning the child as may be appropriate.”); 938.20(c) (“If the juvenile is 15 years of age or older, the person who took the juvenile into custody may release the juvenile without immediate adult supervision after counseling or warning the juvenile as may be appropriate.”).

outer-clothing frisk of someone about to ride in the back of a squad car is more than outweighed by the need to ensure the officers' safety.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

1 Q Did she -- Do you know if she saw you get out of the  
2 car?

3 MR. HEFLIN: Objection. Well, no, I can't.  
4 That's not objectionable.

5 THE WITNESS: I don't know if she saw us.

6 MS. KORNBLUM:

7 Q Now, your testimony is that the only reason you  
8 searched Kelsey was because her mother asked you to  
9 convey her home; correct?

10 A Correct.

11 Q Or you didn't search her but a female officer searched  
12 her?

13 A Correct.

14 Q Why do you search people prior to putting them into  
15 your squad?

16 A It's an officer safety issue. They ride in the back  
17 behind an officer so it's a matter of safety that we  
18 do that.

19 Q Do you search everybody who goes in the back of your  
20 squad car?

21 A Yes.

22 Q When you say "it's an officer safety issue," what  
23 exactly about it makes it unsafe to put somebody in  
24 the back of their squad without searching them?

25 A Well, we -- everybody who goes in the back of my squad

1 car, I will conduct a search, whether it be a pat-down  
2 or full custody search. If they're in custody, I will  
3 perform a custodial search. If they're not, I will  
4 ask their permission to perform a pat-down search for  
5 weapons that might be used against us. Typically in  
6 those cases when they deny a consent, then I will not  
7 put them in the back of my squad. We will find other  
8 ways to do things.

9 Q To your knowledge, did anybody ask Kelsey whether she  
10 consented to being searched?

11 A I did not ask her.

12 Q Now, you also testified that you -- it's standard  
13 procedure that you can take someone into custody prior  
14 to writing a citation; correct?

15 A Prior to writing a citation?

16 Q If you want to write a citation for somebody, one of  
17 the standard procedures is to take them into your  
18 squad car; correct?

19 A Yes.

20 Q And do you perform a search prior to doing that?

21 A Yes.

22 Q So you would perform a search prior to taking her into  
23 the squad car to return her to her parents; right?

24 A Yes.

25 Q Or prior to writing a citation at District 2, if you

1 nothing, I don't believe that she would have received  
2 a citation, although the officer would have had a  
3 basis in which to take her down and identify her. But  
4 the fact that she ran supports the issuance of that  
5 municipal citation. The officer then upon -- before  
6 conveying the juvenile testified that it is his  
7 policy, although it is a reasonable one, to search  
8 suspects.

9 With respect to the frisk and search, police  
10 must have a reasonable suspicion that the person is  
11 armed and dangerous. The evidence in this motion  
12 doesn't necessarily support the suspicion that she was  
13 armed and dangerous, but the officer was just  
14 essentially doing good police work and concerned for  
15 his safety; called for a female officer to have the  
16 juvenile frisked and a pat-down search was conducted.

17 The officer testified and the officer who  
18 conducted the search testified that she felt a hard  
19 object; inquired of the juvenile what the nature of  
20 that object was. There was no response; inquired of  
21 the juvenile if she could remove the object; response  
22 was, yes. The object was removed, and it was  
23 discovered to be a gun.

24 Court at this time will find that the stop  
25 was reasonable and as well as the search. This is all

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

CHILDREN'S DIVISION  
DISPOSITIONAL ORDER  
JUVENILE ADJUDGED DELINQUENT

Case No. 03287019

In the interest of **KELSEY C. R.**

D.O.B. 9-07-83

a person under the age of 18.

**FINDINGS AND JUDGMENT:** The above entitled matter having been heard by this Court on the 3rd day of June, 1999.

**APPEARANCES:** ADA: Lori Kornblum; JUVENILE: Kelsey R.; JUVENILE'S ATTY.: Peter Heflin; IS: Miguel Barillas; MOTHER: Madelyn R.; BROTHER: Clayton Warichak

**THE COURT FINDS THAT:** The juvenile has been found to be delinquent for the commission of **POSSESSION OF A DANGEROUS WEAPON BY A CHILD** contrary to Wisconsin Stats. Sec. 9468.60(2). The juvenile may benefit from a period of supervision under conditions prescribed by the Court.

**THEREFORE, THE COURT ORDERS:** PURSUANT TO WIS. STATS. s. 938.34 (2), THE JUVENILE PLACED UNDER THE SUPERVISION OF THE MILWAUKEE COUNTY DEPARTMENT OF HUMAN SERVICES FOR A PERIOD OF ONE (1) YEAR EXPIRING JUNE 3RD, 2000.

**CONDITIONS OF THE SUPERVISION ARE THAT THE JUVENILE** (X Indicates conditions ordered)

Obey rules of current placement x

Attend school and follow school rules daily including no unexcused absences x

Commit no law violations arising to the level of probable cause finding x

No use of alcohol or illegal drugs x

No possession of weapons of any kind x

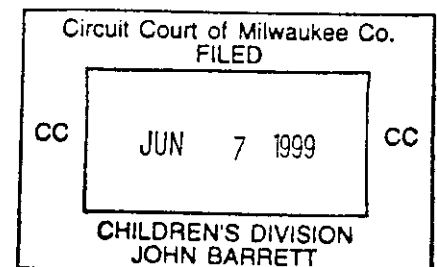
No association with accomplices  
(List names)

No contact with the victim  
(List names)

Cooperate with the Department including making all scheduled appointments, meetings or counseling sessions deemed appropriate by the Department x

Pay restitution joint and several in the minimum amount of \$ and up to \$ as verified by evidence of damage submitted by the victim(s) to the Department within days of this order

Perform 15 hours of community service x



PAGE TWO

CONDITIONS OF SUPERVISION (Continued)

Write a letter of apology to the victim to be submitted to the  
Probation Officer assigned to you by the Department  
within 30 days

Meet with the Probation Officer as requested

x

No absences from the program or placement location without  
permission

**RELEASE OF NAMES:** The Court hereby orders law enforcement  
agency release of the juvenile's and the juvenile's parents'  
names pursuant to s.938.396 (1r) and (1t) and release of the  
amount of restitution pursuant to s.938.396 (2) (fm)

Other: Write three (3) page essay on World War II. Juvenile to pay a \$20.00 victim/witness surcharge.

Placement is in the parental home

Agency Primarily Responsible for Services: Milwaukee County Department of Human Services

Date order expires: JUNE 3RD, 2000

BY THE COURT

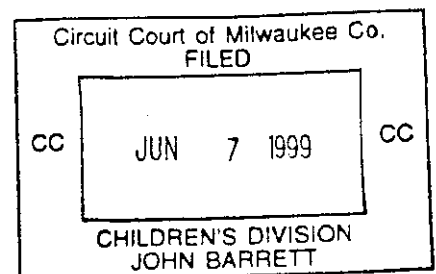
Dated: June 7, 1999

M. Joseph Donald

M. Joseph Donald  
Circuit Court Branch #02

**JUVENILE ADVISED OF APPEAL RIGHTS ON THE RECORD.  
ORAL SANCTION WARNINGS GIVEN ON THE RECORD**

cc



STATE OF WISCONSIN  
IN SUPREME COURT

No. 99-3095

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In the Interest of Kelsey C.R.,  
A Person Under the Age of 17:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

KELSEY C.R.,

Respondent-Appellant-Petitioner.

---

ON REVIEW OF A DECISION OF THE  
COURT OF APPEALS, DISTRICT I,  
AFFIRMING A JUDGMENT OF CONVICTION  
ENTERED IN THE  
CIRCUIT COURT FOR MILWAUKEE COUNTY,  
THE HONORABLE M. JOSEPH DONALD,  
PRESIDING

---

BRIEF OF PETITIONER-RESPONDENT

---

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STATE OF WISCONSIN  
IN SUPREME COURT

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No. 99-3095

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ON REVIEW OF A DECISION OF THE  
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PRESIDING

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BRIEF OF PETITIONER-RESPONDENT

---

ISSUES PRESENTED

1. Did a Fourth Amendment seizure occur when police officers approached Kelsey C.R. on a public street, asked her a few questions from inside their squad car, and then directed her to "stay put" while they parked their car, but instead of yielding to the officers' show of authority, she fled the scene?

The circuit court did not specifically address this issue, instead assuming that the officers' initial questioning of Kelsey and order that she stay put constituted a Fourth Amendment stop (32:64-65, 67). Nevertheless, the court found the officers' actions reasonable (32:65).

The court of appeals likewise assumed that the officers' preliminary questioning of Kelsey and direction that she stay put invoked the protections of the Fourth Amendment (*see* Pet-App. 103). The court, however, ruled the stop reasonable under *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

2. Did the officers have a reasonable basis to frisk Kelsey for the presence of a weapon after her unexplained flight, and when the officers, at the request of Kelsey's mother, decided to place her in their police squad to take her home?

The trial court found that the officer's decision to conduct a frisk was reasonable in order to ensure the safety of the officers who would be taking Kelsey home in their squad car (32:66).

The court of appeals similarly found the frisk reasonable, holding that "the minimal intrusion of an outer-clothing frisk of someone about to ride in the back of a squad car is more than outweighed by the need to ensure the officers' safety" (Pet-App. 104-05).

#### STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The state agrees with the defense that oral argument will be helpful to the court's resolution of the issues in this case. Publication is also warranted since a published decision will further the development of the law in the area of *Terry* stops and frisks.

## ARGUMENT

- I. NO FOURTH AMENDMENT SEIZURE OCCURRED WHEN THE POLICE OFFICERS APPROACHED KELSEY C.R. ON A PUBLIC STREET, ASKED HER A FEW QUESTIONS FROM INSIDE THEIR SQUAD CAR, AND TOLD HER TO "STAY PUT" WHILE THEY PARKED THEIR CAR; AND INSTEAD OF YIELDING TO THE OFFICERS' SHOW OF AUTHORITY, SHE FLED THE SCENE.

### A. Factual background.

During the early evening of Monday, March 1, 1999, Milwaukee Police Officers Bernard Gonzalez and Rafael Rivera had been temporarily assigned to patrol the area of 6th to 16th and Mitchell Streets, because of a high rate of graffiti in that neighborhood (32:6). Officer Gonzalez described the neighborhood as not "a good area[,] especially at night" (32:9, 41). At 7:40 p.m., they observed a young woman, Kelsey C.R., sitting on the sidewalk near 8th and Mitchell (32:7). It was dark by that time, the neighborhood businesses were all closed, and very few people were on the street (32:7). Gonzalez explained that it was "not a place for a young girl to be out alone, especially after dark" (32:41).

When the officers first saw Kelsey, she was sitting with her back against a building with her knees drawn up to her chest, her arms around her, and her head down (32:8). She appeared to be "somewhat withdrawn" (32:8). In order to check on her welfare, Officer Gonzalez stopped his squad car, rolled down the window, and asked Kelsey if she were all right (*id.*). When Kelsey responded that she was, Gonzalez asked her how old she was (*id.*).

Kelsey said she was 15 (*id.*). Gonzalez then asked Kelsey where she lived, and "she kind of pointed with her right hand, said something like, over there in that area" (*id.*). Gonzalez asked her what she was doing, and Kelsey stated that she was waiting for a friend (*id.*).

After asking these preliminary questions from his squad car, Gonzalez decided he was going to stop and talk to her further because he was "wondering if perhaps she was a runaway" (32:9). Gonzales explained his perceptions at this point in the following manner:

[S]he's at 8th and Mitchell at that time of the night. Looking at her, she has got a youthful appearance; she doesn't appear to me to be an individual that you would find at that location. It's not a good neighborhood for a young girl her age to be sitting. She said she was waiting for a friend. Most people I have dealt with that are waiting for a friend -- For example, if I was a young female, 15 years old and a girl waiting for a friend, I would be hoping that friend got there as quickly as they could, especially at 8th and Mitchell. It's not a place for a young girl to be out alone, especially after dark.

So she was not standing on the corner, looking up and down the street waiting for her friend. She was in fact sitting on a sidewalk with her back against the wall, kind of in a withdrawn position, which made me really wonder if she was waiting for a friend or if she had nowhere to go or if she was -- something was wrong with her.

(32:41-42.)

After asking Kelsey these initial questions, Gonzalez told her to "stay put," and began to do a U-turn so that he could park his squad car (32:10). As he was doing so, Kelsey took off running down Mitchell Street, zigzagging through several alleys as the officers pursued her first in their squad, and then on foot (32:10-11). After about a thirty to forty-second chase, Officer Rivera apprehended her on 8th Street, just south of where she had been sitting when the officers first saw her (32:11). At

this point Officer Gonzalez strongly suspected that Kelsey was a runaway or that she was wanted on a capias (*id.*).

After being apprehended, Kelsey identified herself and gave the officers her phone number (32:12). The officers first ran an NCIC computer check, and determined that Kelsey was not listed as a runaway (32:12). Gonzalez then called the phone number Kelsey had given them, and spoke to Kelsey's mother (32:12-13). She informed Gonzalez that Kelsey had not been reported missing, and asked if he would bring Kelsey home (32:13, 29).

Prior to taking Kelsey home, the officers called for a female officer to come and conduct an outer-clothing frisk of Kelsey prior to placing her in the squad car (32:13). Gonzalez noted that this is "standard procedure before conveying anybody" (*id.*). He testified that the reason he had Kelsey frisked was because her mother asked him to bring her home (32:36), and he needed to place Kelsey into his squad to do that (32:39). Gonzalez explained that since Kelsey would be riding in the back of the squad behind the officers, "it's a matter of safety that we [perform a frisk]" (32:36). He described his standard practice as follows:

[E]verybody who goes into the back of my squad car, I will conduct a search, whether it be a pat-down or full custody search. If they're in custody, I will perform a custodial search. If they're not, I will ask their permission to perform a pat-down search for weapons that might be used against us. Typically in those cases when they deny a consent, then I will not put them in the back of my squad. We will find other ways to do things.

(32:36-37.) Officer Gonzalez did not, however, ask Kelsey whether she would consent to a frisk prior to being placed in the squad car (32:37).

Officer Traci Rogers arrived to conduct the frisk about twenty minutes after Kelsey was apprehended (32:13, 46-47). Gonzalez stated that during this time

period, Kelsey was very cooperative (32:16). At the same time, however, Officer Rivera continued to question Kelsey as to why she ran from them, and apparently the officers did not receive a satisfactory response (*see* 32:39-40). Gonzalez explained:

Officer Rivera, my partner, was asking her about -- We kept getting back to why; asking her why she was running; asking if she could explain herself; why she was running, and initially we thought she was running because she was a runaway. That's when we found that not to be the case.

(32:39-40.)

When Officer Rogers arrived, she saw Kelsey sitting on the hood of the squad car (32:47). Rogers immediately approached Kelsey, and asked her to stand up and turn around for the frisk (32:47). As Rogers was patting down Kelsey's outer clothing, she felt a hard object near the front of Kelsey's jeans (32:47). When she felt the object, she asked Kelsey what it was, but Kelsey did not respond (*id.*). Rogers then asked if she could remove the object from her pants (*id.*). Kelsey put her head down, sighed, and said yes (*id.*). The object recovered from Kelsey was a loaded Jennings .22 caliber semi-automatic handgun (32:30-31, 47-48).

B. No Fourth Amendment seizure occurred until the police were able to apprehend Kelsey following the chase.

Kelsey first maintains that Officers Gonzalez and Rivera lacked a reasonable basis to conduct a *Terry* stop following their initial questioning of Kelsey from their squad car. *See* Appellant's brief-in-chief, at 6-12 (citing *Terry v. Ohio*, 391 U.S. 1 (1968)). In so doing, however, Kelsey skips over a fundamental issue, and assumes that the officers' order that Kelsey "stay put" while they

attempted to park their squad car constituted a Fourth Amendment "seizure." This assumption is erroneous.

The Fourth Amendment to the United States Constitution, as well as Article I, § 11 of the Wisconsin Constitution, protect citizens against "unreasonable searches and seizures." See *State v. Betterley*, 191 Wis. 2d 406, 416, 529 N.W.2d 216 (1995) (in construing Article I, § 11, the Wisconsin Supreme Court consistently follows the United States Supreme Court's interpretation of the Fourth Amendment). Yet it is well settled that not all encounters between police officers and citizens constitute "seizures" within the meaning of the Fourth Amendment. See *United States v. Withers*, 972 F.2d 837, 841 (7th Cir. 1992) (citing *Terry*, 392 U.S. at 19 n.16). In *Withers*, the Seventh Circuit Court of Appeals broke down the range of police-citizen encounters into three categories, and reviewed the Fourth Amendment requirements imposed on each of them:

"The first category is an arrest, for which the Fourth Amendment requires that police have probable cause to believe that a person has committed or is committing a crime. The second category is an investigatory stop, which is limited to a brief, non-intrusive detention. This is also a Fourth Amendment 'seizure,' but the officer need only have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime. The third category involves no restraint on the citizen's liberty, and is characterized by an officer seeking the citizen's voluntary cooperation through non-coercive questioning. This is not a seizure within the meaning of the Fourth Amendment."

972 F.2d at 841 (quoting *United States v. Johnson*, 910 F.2d 1506, 1508 (7th Cir. 1990), *cert. denied*, 498 U.S. 1051 (1991)).

Similarly, the United States Supreme Court has held that a seizure occurs only "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry*, 392 U.S. at

19 n.16. The test for determining whether a seizure has occurred is expressed in objective terms: "[A] person has been "seized" within the meaning of the Fourth Amendment . . . only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (quoting *United States v. Mendenhall*, 466 U.S. 544, 554 (1980) (opinion of Stewart, J.)).

Therefore, Officer Gonzalez's preliminary questioning of Kelsey before she fled could only have resulted in a Fourth Amendment seizure if, based on his actions, a reasonable person would not have felt free to leave. In this regard, the Supreme Court has held that:

[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification.

*Florida v. Royer*, 460 U.S. 491, 497 (1983) (citations omitted); see also *United States v. McCarthur*, 6 F.3d 1270, 1275-77 (7th Cir. 1993) (no seizure occurred when two police officers approached defendant in a nonconfrontational manner in the public concourse of a train station, did not display weapons, requested permission to speak with McCarthur, and told her she was free to leave); *Florida v. Bostick*, 501 U.S. 429 (1991).

In this case, the officers merely approached Kelsey on a public street, asked her questions from inside their police squad, and sought her responses to those questions in a nonconfrontational manner. At least up to the point the officers asked that Kelsey "stay put," the officers were "doing nothing that could be construed as a Fourth

Amendment seizure unless one views all encounters between the police and citizens as seizures requiring justification, and we do not." *United States v. Cordell*, 723 F.2d 1283, 1285 (7th Cir. 1983), *cert. denied*, 465 U.S. 1029 (1984). Thus, this initial encounter did not constitute a "seizure" requiring Fourth Amendment scrutiny.

Kelsey nevertheless appears to maintain that a seizure occurred immediately after the officers' initial questioning from inside their squad car, when Officer Gonzalez told Kelsey to "stay put." See Appellant's brief-in-chief, at 7 (noting that the "trial court held that when the officer told Kelsey to 'stay put' a seizure occurred for Fourth Amendment purposes," and arguing the validity of the alleged seizure on that basis). The Supreme Court, however, has held that the term seizure "does not remotely apply . . . [to a] policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee." *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

In *Hodari D.*, the Court examined the question of whether a seizure occurs when an officer has made a show of authority, such as by yelling at a fleeing suspect to stop, but the suspect runs away or fails to yield to the officer's commands. 499 U.S. at 626. In that case, a group of youths fled at the approach of an unmarked police car. One of the officers left his squad car and gave chase, trapping Hodari and causing him to toss away a small rock of crack cocaine. A moment later, the officer tackled Hodari, handcuffed him, and radioed for assistance. *Id.* at 622-23. Hodari moved to suppress the crack cocaine evidence on the ground that it was obtained in violation of the Fourth Amendment. Hodari's argument, accepted by the California Court of Appeals, was that he had been seized when he saw the officer running towards him, that this seizure was unreasonable under the Fourth Amendment, and that the evidence of cocaine had to be suppressed as a fruit of that illegal seizure. *Id.* at 623.

The Supreme Court reversed, holding that Hodari had not been seized at the time he discarded the drugs because he had not yet yielded to the pursuing police. *Id.* at 626. In reaching this conclusion, the Court reasoned that for a fleeing suspect to be seized for Fourth Amendment purposes, the arresting officer must apply physical force or display a show of authority, *and* the physical force or show of authority must cause the fleeing suspect to stop. *Id.* at 626-29. Applying this test, the Seventh Circuit Court of Appeals has recognized that "a fleeing suspect--even one who is confronted with an obvious show of authority--is not seized until his freedom of movement has been terminated by an intentional application of physical force or by the suspect's submission to the asserted authority." *Kernats v. O'Sullivan*, 35 F.3d 1171, 1178 n.4 (7th Cir. 1994).

Although this court has not had the opportunity to apply the *Hodari D.* analysis, other courts have found the lack of a Fourth Amendment seizure in circumstances analogous to those in this case. For example, in *United States v. Washington*, 12 F.3d 1128 (D.C. Cir. 1994), the court ruled that no seizure occurred when the police ordered a defendant to stop the automobile he was driving. Although the driver initially stopped, he drove off before the police could reach his vehicle. Thus, the defendant did not submit to the police order. *Id.* at 1132 (citing *Hodari D.*, 499 U.S. at 626-27). In *United States v. Hernandez*, 27 F.3d 1403 (9th Cir. 1994), the court held that no seizure occurred when police told a defendant to stop and grabbed him while he tried to flee but the defendant did not submit to the officer's show of authority and the police did not subdue the suspect. "A seizure does not occur if an officer applies physical force in an attempt to detain a suspect but such force is ineffective." *Id.* at 1407 (citing *Hodari D.*, 499 U.S. at 625).

Similarly, in this case the officers undoubtedly displayed a show of authority when they told Kelsey to "stay put." Yet *Hodari D.* teaches that a show of authority alone does not result in a seizure. Instead, the suspect

must either yield to the officer's command or be actually restrained by the officer. Here neither occurred until the officers caught Kelsey following their thirty to forty-second chase. Therefore, this court should reject Kelsey's argument that an illegal stop occurred when Officer Gonzalez told Kelsey to stay put, because instead of yielding to their command, she fled the scene.<sup>1</sup>

To the extent this court finds that a seizure occurred prior to the time the officers physically apprehended Kelsey, the court of appeals rightly held that the officers' actions were justified under a community caretaker analysis. See Pet-App. 103 (citing *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987), *rev'd on other grounds*, 155 Wis. 2d 77, 454 N.W.2d 763 (1990)). In this regard, Kelsey concedes that in checking on Kelsey's welfare, the police were conducting a bona fide caretaker activity. Thus, the only remaining issue under the community caretaker analysis is "whether the public need and interest outweigh the intrusion upon the privacy of the individual." *Anderson*, 142 Wis. 2d at 169. In this case, the officers' intrusion upon Kelsey's privacy, consisting of a request that she stay put so that the officers could determine whether she was a runaway or needed assistance, was relatively limited. On the other side of the balance, the public interest involved--the protection of a juvenile who may be in need of assistance--was great. Under the totality of these circumstances, this court should conclude, like the court of appeals, that the officers' actions were reasonable for purposes of the Fourth Amendment and Article I, § 11 of the Wisconsin Constitution.

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<sup>1</sup>In her brief, Kelsey explicitly states that she is not challenging the legality of the officers' seizure of Kelsey after she fled from them. See Appellant's brief-in-chief, at 7. This is an appropriate concession, for in *State v. Anderson*, 155 Wis. 2d 77, 454 N.W.2d 763 (1990), this court held that an individual's flight from the police in and of itself is sufficient to justify a temporary investigative stop. *Id.* at 79-88.

II. OFFICER GONZALEZ'S DECISION  
TO FRISK KELSEY BEFORE  
TAKING HER HOME WAS  
REASONABLE IN LIGHT OF  
KELSEY'S UNEXPLAINED FLIGHT  
AND THE NEED TO PLACE HER IN  
THE SQUAD CAR.

Kelsey next asserts that Officer Gonzalez's decision to have Kelsey frisked before placing her in his squad car and taking her home constituted an unreasonable search in violation of the Fourth Amendment. As a preliminary matter, Kelsey accurately points out that Gonzalez testified that, for safety reasons, his standard procedure is to conduct a frisk of anyone who will be riding in the back of his squad car. See Appellant's brief-in-chief, at 15 (citing 32:13 of the trial court record).<sup>2</sup> As a result, Kelsey argues that the officer's decision to search was based solely on a routine practice rather than any particularized reason to suspect that Kelsey may be armed.

It is true that Gonzalez had Officer Rogers frisk Kelsey because of a routine grounded on officer safety concerns. But the reasonableness of a Fourth Amendment search is not determined by reviewing only the officer's subjective reasons for conducting a search. This is because the reasonableness of a protective frisk is determined based upon an objective standard in light of the "totality of the circumstances" surrounding the search. *State v. Richardson*, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990). That standard is "whether a reasonably prudent man in the circumstances would be

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<sup>2</sup>Although Officer Gonzalez noted that this was his standard procedure, he also explained that if the suspect is not in custody, he will typically ask their permission to perform a pat-down search for weapons (32:36-37). If consent is denied, he will not put the suspect in the back of his squad car (32:36-37). Gonzalez did not ask Kelsey if she would consent to a frisk in this case (32:37). However, after speaking with Kelsey's mother, Gonzalez had already decided that he was going to place Kelsey in his squad car and take her home (32:36).

warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27.

Because an objective, totality of the circumstances approach is utilized, the fact that Officer Gonzalez subjectively intended to place Kelsey in his squad car as a matter of routine procedure does not mean that this court cannot consider the remainder of the circumstances in existence at the time of the frisk. *See State v. Morgan*, 197 Wis. 2d 200, 216, 539 N.W.2d 887 (1995) (Geske, J., concurring) ("Individual factors [relevant to a *Terry* frisk] cannot simply be pulled out and discarded one by one."). As this court explained in *State v. McGill*, 2000 WI 38, 234 Wis. 2d 560, 609 N.W.2d 795:

[T]he record establishes a number of very specific facts that support [a reasonable] suspicion, although not all were relied upon by the officer as part of his subjective analysis of the situation. But as we have stated, this is an objective test, and therefore certain factors, such as the time of night and the fact that the officer was alone, can and should be part of the equation. *Terry's* requirement that the facts supporting the frisk be "articulable" means that they must be concrete rather than speculative, in order to avoid searches based upon the proverbial "hunch." It does not amount to a requirement that the court restrict its reasonableness analysis to the factors the officer testifies to having subjectively weighed in his ultimate decision to conduct the frisk. . . . We may look to any fact in the record, as long as it was known to the officer at the time he conducted the frisk and is otherwise supported by his testimony at the suppression hearing.

234 Wis. 2d 560, ¶24. Thus, regardless of Officer Gonzalez's subjective reasons for conducting the frisk, the question before this court is whether his decision to conduct a frisk before placing Kelsey in his squad car and taking her home was, under the totality of the circumstances, reasonable in light of the potentially dangerous situation facing the officers at the time.

With respect to this question, Kelsey asserts that "there is no evidence in the record suggesting that a reasonable officer would suspect that Kelsey was armed." Appellant's brief-in-chief, at 15. This is clearly not the case; in fact, several specific facts in the record support the suspicion that Kelsey may have been armed, and that she could pose a danger to the officers, particularly in the close confines of the back of a police squad.

First, Officer Gonzalez testified that the neighborhood in which the frisk took place, near 8th and Mitchell in the City of Milwaukee, was not "a good area[,] especially at night" (32:9, 41). Gonzalez also noted that the area was the subject of a "Directed Patrol" because of a high rate of graffiti (32:6). This court has held "that an officer's perception of an area as 'high-crime' can be a factor justifying a search." *Morgan*, 197 Wis. 2d at 211. Similarly, in the related area of *Terry* stops, Professor LaFave has recognized that "the area in which the suspect is found is itself a highly relevant consideration" in justifying a stop, and that the cases "most frequently stress that the observed circumstances occurred in a high-crime area." 4 Wayne R. LaFave, *Search and Seizure* § 9.4(f), at 189 (3d ed. 1996). While this court has recognized the limitations of this factor, as many citizens are forced to live or work in areas that have high crime rates, this is one of several factors that support Officer Gonzalez's actions in this case. *See Morgan*, 197 Wis. 2d at 211-13.

Gonzalez next noted when he first saw Kelsey sitting alone on the sidewalk at 7:40 p.m., it was dark outside, the area businesses were all closed, and very few people were on the street (32:7). This court has "consistently upheld protective frisks that occur in the evening hours, recognizing that at night, an officer's visibility is reduced by darkness and there are fewer people on the street to observe the encounter." *State v. McGill*, 234 Wis. 2d 560, ¶32 (noting that "most assaults on police officers occur during the evening or nighttime hours"). *See also Morgan*, 197 Wis. 2d at 212-13 (upholding a frisk that occurred in the early morning hours

in a dark alley); *State v. Williamson*, 113 Wis. 2d 389, 391-93, 335 N.W.2d 814 (1983) (upholding frisk in part because incident occurred at 2:00 a.m. and visibility was poor). Although the area near 8th and Mitchell was lit by standard streetlights (32:32), the reputation of the neighborhood and the absence of other people on the street only served to increase the possible danger to the officers.

While these facts provide a relevant backdrop to Officer Gonzalez's decision to conduct a frisk, perhaps the most important fact supporting an inference of dangerousness is Kelsey's flight upon being asked to stay put. *See, e.g., State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990) ("Flight at the sight of police is undeniably suspicious behavior."). This fact, in combination with the other circumstances and the officers' need to transport Kelsey in their squad car, makes the inference of dangerousness at least as strong as that present in *McGill*, in which this court upheld the legality of a *Terry* frisk.

In *McGill*, the police observed a motorist driving on a closed street, and attempted to pull him over. 234 Wis. 2d 560, ¶¶2-3. However, the vehicle did not immediately stop, and instead proceeded several blocks before turning into a driveway and stopping. *Id.* at ¶¶4-5. As the officer pulled his squad behind the vehicle, he observed the driver get out of the car and walk away as if he were "trying to avoid being with that vehicle or being stopped by the police." *Id.* at ¶5. Only when the officer ordered the driver to stop did he stop and return to where the officer was standing. *Id.* at ¶6. At the officer's request, the driver produced a driver's license, but the officer testified that he appeared nervous, that his hands were twitching, and that he had the odor of intoxicants and marijuana on his person. *Id.* at ¶¶6-7. Based on these facts, the officer frisked the driver for weapons and then handcuffed him before proceeding to conduct field sobriety tests. *Id.* at ¶¶8-11.

Finding the frisk reasonable, this court, while examining the totality of the circumstances, recognized that McGill's decision to walk away from the officer, even prior to the verbal order to stop, was a significant fact justifying the frisk. *McGill*, 234 Wis. 2d 560, ¶¶27-28. The court explained:

The facts known to Officer Wald in this case are arguably more compelling than the facts known to the officers in *Morgan* and *Williamson*. Here, Wald initially attempted to perform a routine traffic stop, but McGill resisted....

Once his car was stopped, McGill did not remain in the driver's seat and wait for the officer to approach (as most people do, according to Wald's testimony), but, rather, got out of the car and began walking away. It is reasonable to infer, as Officer Wald did, that McGill was trying to avoid the encounter.

*Id.* The court further recognized that in failing to stop and attempting to avoid the encounter, McGill was acting "as if he had something--perhaps a weapon--to hide." *Id.* at ¶33. *Cf. Morgan*, 197 Wis. 2d at 214-15 (noting that one explanation for Morgan's nervousness "might have been the fact that he was carrying a loaded .22-caliber pistol and drug paraphernalia while speaking to an officer of the law").

In this case, Kelsey did more than just act nervous, as in *Morgan*, or walk away from an officer, as in *McGill*. She took off in a full run, and continued to flee until she was physically apprehended. Thus, Officer Gonzalez was presented with a young girl sitting on a deserted sidewalk, at night in a bad neighborhood, who fled upon being asked to stay put. Under these circumstances, the inference that Kelsey may have something to hide, including possibly a weapon, was at least as strong as the inference of dangerousness present in *McGill*.

Kelsey notes, however, that the actual frisk was not conducted until approximately twenty minutes after she

was apprehended, and that she was "very cooperative" during that time period. Thus, she suggests, any concern for officer safety dissipated during this twenty-minute delay. See Appellant's brief-in-chief, at 16. The record, however, does not bear out this assertion. Officer Gonzalez testified that during the twenty-minute delay, he was able to confirm that Kelsey was not in fact a runaway, as he had initially suspected. At the same time, Officer Rivera continued to question Kelsey as to why she fled from the officers, and he did not receive a satisfactory response (see 32:39-40) ("[w]e kept getting back to why; asking her why she was running; asking if she could explain herself"). Because the officers were unable to determine why she ran, the inference that Kelsey may have had something to hide (possibly a weapon) was just as strong at the time of the frisk as it was when she was first apprehended.

Finally, although not directly addressed by this court, various authorities have recognized that the need to place a person in an officer's squad car is a fact that supports the reasonableness of a *Terry* frisk. Professor LaFave, for one, has recognized that "in an otherwise doubtful case the frisk may be justified by the fact that the investigation requires transporting the suspect in the police car to another location." LaFave, § 9.5(a), at 259. Indeed, the attorneys general from several states (including the Wisconsin Attorney General), have in previous cases advocated the adoption of a bright-line rule that a suspect's necessary presence in a police car is *itself* grounds for a frisk. See *Morgan*, 197 Wis. 2d at 215 (declining the state's invitation to formulate a bright-line rule making all searches justified when a police officer intends to place a suspect in a squad car); *State v. Varnado*, 582 N.W.2d 886, 890 (Minn. 1998) (rejecting the State of Minnesota's request "that this court adopt a blanket rule allowing officers to require lawfully stopped citizens to sit in the back of squad cars and to frisk such citizens before they enter the squad car"). Although no court has accepted this position outright, many cases, including *Varnado*, recognize that "when an officer has a

valid reasonable basis for placing a lawfully stopped citizen in a squad car, a frisk will often be appropriate without additional individual articulable suspicion." *Varnado*, 582 N.W.2d at 891.

In one of these cases, *State v. Evans*, 618 N.E.2d 162 (Ohio 1993), two officers were on routine patrol when they observed a vehicle being driven with one of its headlights out. 618 N.E.2d at 164. The officers stopped the vehicle, approached the driver and asked him to produce his driver's license. *Id.* The driver, Dwayne Evans, did not have his license. *Id.* While questioning Evans, the officers received a broadcast that a male wearing a red jogging suit "had just made a drug transaction" and that he was believed to be driving westbound on Glynn Road in a gray car. *Id.* The officers observed that Evans' clothing and car matched the description provided in the radio broadcast. *Id.*

The officers then ordered Evans out of the car, intending to place him in their squad car while they ran a computer check to verify the existence of his driver's license. *Id.* at 164, 167. Before placing Evans in the squad car, however, one of the officers conducted a pat-down search of his person. The officer testified that he performed the protective search because he wanted to be sure that Evans did not possess weapons while being detained in the patrol car. *Id.* at 167. While conducting the search, the officer felt a large bulge in Evans' front pants pocket. *Id.* at 164. The officer reached into this pocket and removed a large wad of money and a small packet of crack cocaine. *Id.*

Finding the protective search reasonable under *Terry*, the Ohio Supreme Court noted initially that the officers' pat-down search of the defendant was in accordance with standard police procedure which dictates that protective measures be taken before a person is to be held in the back seat of a squad car. *Id.* at 167. *Cf. State v. Swanson*, 164 Wis. 2d 437, 442, 475 N.W.2d 148 (1991) (noting that for officer safety, the City of Prescott

Police Department has a departmental policy that requires an officer to perform a pat-down search prior to placing anyone in a squad car). Stressing the increased danger presented by the need to place a person in the back seat of a squad car, the court explained: "Certainly it is reasonable that the officer, who has a legitimate reason to so detain that person, is interested in guarding against an ambush from the rear." *Evans*, 618 N.E.2d at 167. The court therefore held that when "balanced against the driver's minimal privacy interests under these circumstances, we can only conclude that the driver of a motor vehicle may be subjected to a brief pat-down search for weapons where the detaining officer has a lawful reason to detain said driver in the patrol car." *Id.* See also *People v. Tobin*, 269 Cal. Rptr. 81 (Cal. Ct. App. 1990) (holding that the need to transport a person in a police vehicle in itself is an exigency which justifies a pat-down search for weapons).

On the other end of the spectrum are cases such as *United States v. Glenn*, 152 F.3d 1047 (8th Cir. 1998). In *Glenn*, a police officer placed Glenn, the driver of a car stopped for equipment violations, in the back seat of his patrol car after Glenn could not produce his license. The officer testified that Glenn's behavior did not cause him to fear for his safety and that he had no reason to believe that Glenn had a gun. *Id.* at 1049. However, prior to placing Glenn in his squad car, the officer conducted a frisk of Glenn's person (during which the officer found a loaded semi-automatic handgun) because "this was his routine practice when placing drivers in the back seat of his car during traffic stops." *Id.* The court rejected this reasoning, finding it "contrary to *Terry's* reasonable suspicion requirement and would permit law enforcement officers to pat down all traffic offenders simply by choosing to place them in the back seat of patrol cars during traffic stops. An officer's decision to place a traffic offender in the back seat of a patrol car does not create a reasonable, articulable suspicion to justify a pat-down search that the circumstances would not otherwise allow." *Id.* at 1049.

In an attempt to address the concern expressed in *Glenn*--that officers could themselves create the circumstances justifying a frisk simply by choosing to place people in a squad car during any traffic stop--some courts have adopted rules similar to the one articulated in *People v. Scott*, 546 P.2d 327 (Cal. 1976). There, the California Supreme Court held that where an officer does not have a "duty" to transport the defendant, such as an officer who volunteers to give an individual a ride, the officer must inform the person of his or her right to refuse the ride and thereby avoid a protective search. *Id.* at 332-33.

In *Scott*, highway patrol officers spotted the defendant and his three-year-old son standing on a traffic island at the intersection of State Highway 101 and an off-ramp. 546 P.2d at 329. Both were urinating, and the defendant appeared to be intoxicated. He told the officers that he was returning his son to his ex-wife in San Francisco when they were ordered out of the car in which a friend had been giving them a ride. Rather than arresting the defendant, the officers volunteered to drive the pair to their destination. The boy was placed in the squad car, but before the defendant could enter the vehicle the officer informed him that he had to be patted down for the officers' protection. As the defendant lifted his arms, a pocket of his jacket opened partially, revealing a bag of marijuana. *Id.*

In a 4-3 decision, a majority of the California Supreme Court found the officer's actions unreasonable under *Terry* because "at no time has it been claimed Officer Schultz did in fact fear that defendant was 'armed and dangerous.'" *Id.* at 332. In so holding, however, the court explained that it was "not oblivious to the dilemma faced by the conscientious officers under the circumstances of this case. The lateness of the hour, the dangers inherent to pedestrians on a freeway, the presence of a young child, the condition of the defendant, combined to suggest some remedial action was necessary." *Id.* The court then suggested that the dilemma was not insoluble:

We are required to accommodate the state's interest in the safety of *police officers who volunteer to give rides not required by their duty*, and the individual's right to be secure from unreasonable invasions of his privacy. In our view the simple expedient of a warning and option will at once preserve both laudatory objectives. Accordingly, in order for a pat-down search to be valid under these or similar circumstances the officer must first inform the individual that he has a right to refuse the ride but if he accepts it he will be subjected to a pat-down search for weapons.

546 P.2d at 332-33 (footnote omitted; emphasis added).

In a dissenting opinion, Justice Richardson, joined by two other justices, argued persuasively that under the circumstances of the case: (1) the officers did have a duty to transport the defendant and his son away from the scene, and (2) the pat-down search was justified incident to the transportation of the defendant and his son to safety. *Id.* at 336 (Richardson, J., dissenting).

Consistent with the rationale of the *Scott* dissent, a number of courts have upheld the validity of a protective frisk when the officer has either a duty to transport the defendant in his squad car, or a legitimate reason for doing so. *See, e.g., People v. Otto*, 284 N.W.2d 273 (Mich. Ct. App. 1979) (frisk upheld where officer picked up a person illegally hitchhiking on a freeway, even where no cause to arrest existed and no facts indicated that defendant was armed and dangerous); *Byrd v. State*, 458 A.2d 23 (Del. 1983) (stressing officer's testimony "that defendant was frisked because they intended to transport him to the scene of the crime and they wanted to be sure he could not pull a weapon on them while in the police car"); *State v. Curtis*, 190 N.W.2d 631, 636 (Minn. 1971) (stating that police have a "right, for their own protection, to search a person before placing him in a squad car if there is a valid reason for requiring him to enter the vehicle and it is not merely an excuse for an otherwise improper search"); *Commonwealth v. Bedsaul*, 444 A.2d 717, 718 (Pa. Super. Ct. 1982) (upholding an officer's decision to frisk before

placing the defendant in his squad car where male suspect was found intoxicated in woman's dormitory and requested a ride home).

While some courts have adopted variations of the approach suggested in *Scott*, most do so where, unlike the cases cited above, there is no strong justification for the officer's desire to place the suspect in the police squad. See, e.g., *Village of Pemberville v. Hale*, 709 N.E.2d 227, 229 (Ohio Ct. App. 1998) (holding that the passenger of a car stopped because the driver was carrying a concealed weapon should have the option of arranging his own transportation home rather than being required to ride in a police car and being subjected to a frisk). Other courts have not explicitly imposed the *Scott* requirement in all cases. Instead, these cases recognize, either explicitly or implicitly, that an officer's decision to provide a choice between accepting the ride (and thus the frisk) and declining the ride bears on the overall reasonableness of the search. See, e.g., *People v. Lombardi*, 727 A.2d 670, 674 (R.I. 1999) (frisk reasonable where officer offered to drive intoxicated person home in police vehicle, and informed him that the officer would have to conduct a frisk before placing him in the squad); *People v. Hannaford*, 421 N.W.2d 608 (Mich. Ct. App. 1988) (frisk reasonable where officer gave passenger of car in which the driver was arrested the option of riding in squad car and being frisked or walking to a nearby gas station); *Commonwealth v. Rehmeier*, 502 A.2d 1332 (Pa. Super. Ct. 1985) (frisk reasonable where police stopped driver on suspicion of drunk driving, decided not to arrest the driver, and gave him the option of riding home in the patrol car or arranging for his own transportation).

Whatever the merits of the approach suggested in *Scott*, its rationale does not apply to this case.<sup>3</sup> This is because unlike the finding of the *Scott* majority--that the officers did not have a legal duty to transport the stranded pedestrians--the officers here did have an obligation to transport Kelsey home at her mother's request. As the court of appeals recognized, it has long been established that police officers in Wisconsin have a community caretaker function. Pet-App. 103 (*citing Anderson*, 142 Wis. 2d at 169). Because of this, the Law Enforcement Code of Ethics provides that:

[A] law enforcement officer's "fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the constitutional rights of all men to liberty, equality, and justice."

*State v. Johnson*, 177 Wis. 2d 224, 239 n.2, 501 N.W.2d 876 (Ct. App. 1993) (Wedemeyer, J., dissenting) (quoting Law Enforcement Code of Ethics).

The non-law enforcement duties discharged by Officers Gonzalez and Rivera--carried out to protect the welfare of a child in need of assistance--are commonly accepted and well recognized in Wisconsin law. *See, e.g.*, Wis. Stat. § 48.19(1)(d) (providing that a child may be taken into custody where a child has run away from his or

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<sup>3</sup>Kelsey also fails to explain how the *Scott* requirement--mandating that the officer inform the suspect that he may either decline the ride or submit to a pat-down--would work in this case, where a child's mother has requested the officer to transport the child home. What if the child were to decline the ride? Would the officer be required to ignore the parent's request? The state respectfully suggests that a rigid application of the *Scott* rule would be unworkable in many situations. For instance, in cases involving the welfare of children, an officer must often communicate with the child's parents, whose wishes may not coincide with that of the child. In other scenarios, the person being assisted by the police may have no alternative to accepting a ride in a squad car, and the officer's abandonment of that person may well not be an option.

her parents, or where the child is in immediate danger from his or her surroundings and removal from those surroundings is necessary). Indeed, the officers here could well have been the subject of criticism and potential civil liability if they had not taken Kelsey home as her mother requested, and some harm had come to her. *Cf. Lombardi*, 727 A.2d at 674 (recognizing that an officer's failure to assist an intoxicated pedestrian could subject the officer to criticism and civil liability).

Moreover, *Terry* itself contemplates the kind of police activity that involves neither the investigation nor enforcement of the criminal laws: "Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime." *Terry*, 392 U.S. at 13. *See also Scott*, 546 P.2d at 337 (Richardson, J., dissenting) (noting that the ABA Standards Relating to the Administration of Criminal Justice recognize that most police agencies are given the responsibility to aid individuals who are in danger, to assist those who cannot care for themselves, and to facilitate the movement of people and vehicles). Because the officers here had a legitimate reason, if not an outright legal duty, to place Kelsey in their squad car--both to protect Kelsey from potential harm, and to honor the wishes of her mother--this court should find the requirements of *Scott* and its progeny inapplicable to this case.

Notwithstanding the tension between these various approaches outlined above, the case law has almost uniformly held that the need to place a suspect in a police car, while perhaps alone not enough to justify a frisk, is a significant fact supporting an officer's decision to conduct a protective search. In this case, the officers had a legitimate need, based on the request of Kelsey's mother, to place Kelsey in their squad car and bring her home. There is, moreover, absolutely no suggestion in this case that the officers decided to place Kelsey in their squad car in order to create the circumstances justifying a search. In light of this, and the other circumstances facing the

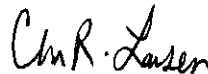
officers--the time of day, the nature of the neighborhood, and Kelsey's unexplained flight--the potential danger to the officers manifestly outweighed the minimal intrusion of an outer-clothing frisk. This court should conclude, like the lower courts, that the officer's decision to conduct a frisk was reasonable under the Fourth Amendment and Article I, § 11 of the Wisconsin Constitution.

### CONCLUSION

For the reasons set forth above, the petitioner-respondent respectfully requests that this court affirm the decision of the court of appeals.

Respectfully submitted,

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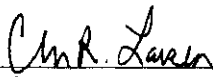
  
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# CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 7,883 words.

  
Chris R. Larsen

STATE OF WISCONSIN  
IN SUPREME COURT

Case No. 99-3095

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In the Interest of Kelsey C.R.,  
A Person Under the Age of 17:

STATE OF WISCONSIN,  
Petitioner-Respondent,

v.

KELSEY C.R.,  
Respondent-Appellant-Petitioner.

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ON A PETITION FROM A DECISION OF  
THE COURT OF APPEALS, DISTRICT I,  
AFFIRMING THE DENIAL OF A SUPPRESSION  
MOTION ENTERED IN THE CIRCUIT  
COURT OF MILWAUKEE COUNTY, THE  
HONORABLE M. JOSEPH DONALD, PRESIDING.

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REPLY BRIEF OF RESPONDENT-  
APPELLANT-PETITIONER

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REPLY BRIEF OF RESPONDENT-  
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ARGUMENT

- I. KELSEY WAS SEIZED WHEN THE OFFICERS ORDERED HER TO "STAY PUT" BECAUSE A REASONABLE PERSON IN KELSEY'S POSITION WOULD NOT HAVE FELT FREE TO LEAVE.

The state in its brief argues that contrary to the trial court's ruling, no seizure took place when the officers

ordered Kelsey to “stay put.” (State’s Brief at 9). Citing *California v. Hodari D.*, 499 U.S. 621, 626 (1991), the state argues that there is no seizure of a fleeing suspect until the officer’s “physical force or show of authority ... cause the fleeing suspect to stop.” *Id.* at 626-629.

However, the *Hodari D.* standard has never been expressly adopted in Wisconsin and Kelsey urges this court to maintain its standard of evaluating a seizure’s reasonableness by considering whether a reasonable person would feel free to leave. *State v. Howard*, 176 Wis. 2d 921, 929, 501 N.W.2d 9 (1993). States have the authority to interpret their state constitutions. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Article I, sec. 11 sets out Wisconsin’s protections against unreasonable searches and seizures and this court should find that Wisconsin’s constitutional protections are greater than those articulated in *Hodari D.*

The *Hodari D.* standard has been widely criticized and flatly rejected by many states. Professor LaFave has been particularly critical of the decision, “The result reached in *Hodari D.*, aptly characterized by one commentator as ‘the latest manifestation of the Court’s ‘surreal and Orwellian’ view of personal security in contemporary America,’ is incorrect precisely because this ‘literal-minded’ analysis (as the dissenters put it) pushes the court in the wrong direction.” 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* sec. 9.3(d), at 125 (3<sup>rd</sup> ed. 1996).

The *Hodari D.* test shifts the focus away from the objective reasonableness of the police conduct and instead places it on the person’s subjective reaction to the police. The suspect’s reaction to the police, i.e. to flee, becomes the critical point for determining whether there is a seizure. This subjective focus is directly contrary to the way Wisconsin has been evaluating whether a seizure has occurred, “the test used to determine whether a seizure of the person has occurred is whether ‘in view of

all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” (citations omitted). The test is an objective one.” *State v. Howard*, 176 Wis. 2d 921, 929, 501 N.W.2d 9 (1993). *See also, State v. Griffith*, 2000 WI 77, 236 Wis. 2d 48, 68-69, 613 N.W.2d 72; *State v. Harris*, 206 Wis. 2d 243, 252, 557 N.W.2d 245 (1996).

In *Terry v. Ohio*, 392 U.S. 1, 19 (1967), the court held that a seizure occurs when a police officer has in some way restrained the liberty of a citizen by means of physical force or physical authority. In *United States v. Mendenhall*, 466 U.S. 544, 554 (1980), the court established the test that a seizure occurs “only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” The focus is on whether the person is free to ignore the officer’s questions and walk away.

*Hodari D.* added a second part to the *Mendenhall* test. Pursuant to *Hodari D.*, a reasonable person must believe that he is not free to leave *and* he must submit to police authority.

Professor LaFave characterizes this additional test as “what would otherwise be a groundless and thus illegal Terry seizure becomes conduct totally outside the Fourth Amendment merely because of the suspect’s nonsubmission.” LaFave at 128.

LaFave is not alone in his criticism. At least eleven states have expressly rejected the *Hodari D.* test in favor of maintaining the “free to leave” test. *See State v. Tucker*, 626 So.2d 707 (La. 1993); *Baker v. Commonwealth*, 5 S.W.3d 142 (Ky. 1999); *Commonwealth v. Rock*, 710 N.E.2d 595 (Mass. 1999); *State v. Young*, 957 P.2d 681 (Wash. 1998); *Commonwealth v. Matos*, 672 A.2d 769 (Pa. 1996); *People v. Holmes*, 601 N.Y.S.2d 459 (N.Y. 1993); *State v. Tucker*, 642 A.2d 401 (N.J. 1994); *State v. Quino*, 840

P.2d 358 (Haw. 1992); *Jones v. State*, 745 A.2d 856 (Del. 1999); *In the Matter of E.D.J.*, 502 N.W.2d 779 (Minn. 1993); *State v. Oquendo*, 613 A.2d 1300 (Conn. 1992).

Likewise, Wisconsin should turn to its own constitution and the test that it has previously articulated and reiterated and continue to evaluate a seizure on the basis of whether a reasonable person would feel free to leave. Pursuant to this analysis, Kelsey clearly was seized when the officers ordered her to “stay put.” A reasonable person would believe that when two uniformed officers order her to “stay put” that she is not free to leave.

Because Kelsey was seized in violation of the Wisconsin constitution’s protection against unreasonable seizures, the evidence obtained as a result of that unreasonable seizure must be suppressed.

## **II. THE OFFICERS HAD NO REASONABLE BASIS TO SUSPECT THAT KELSEY WAS ARMED AND DANGEROUS AND THUS NO BASIS TO CONDUCT THE SEARCH.**

The state does not ask this court to adopt a blanket rule permitting officers to search every person they intend to place in the squad car (State’s Brief at 17). In fact, the state concedes that “no court has accepted this position outright.” (State’s Brief at 17).

Instead, the state frames the issue as “the question before this court is whether his decision to conduct a frisk before placing Kelsey in his squad car and taking her home was, under the totality of the circumstances, reasonable...” (State’s Brief at 13). Kelsey agrees that this case should be resolved by analyzing whether or not the search was reasonable. The evidence in this case should be suppressed because it was not reasonable to conduct a frisk under these circumstances.

A Fourth Amendment reasonableness analysis is based on an objective standard. *State v. Richardson*, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990). However, this does not mean that the officer's subjective intent should be entirely disregarded. In Kelsey's case, the officer specifically testified that the only reason he searched Kelsey was because he intended to put her in his squad car (32:36, 39). At no point during his testimony does the officer ever come close to stating that he suspected that Kelsey was armed and dangerous. Likewise, the trial court did not find that there was reasonable suspicion to believe that Kelsey was armed and dangerous (32:66). A review of the facts makes it clear why the officer subjectively did not fear for his safety and why an objectively reasonable officer would also not fear for his safety.

First, the state points out that the frisk took place in a high-crime neighborhood (State's Brief at 14). The only discussion of the character of the neighborhood came from Officer Gonzalez's testimony that he was concerned for Kelsey, "It's not a good neighborhood for a young girl her age to be sitting...It's not a place for a young girl to be out alone, especially after dark." (32:41). All concern about the neighborhood focused on Kelsey's safety, not the officers'. It turns the fact on its head to suggest that the officers' concern about Kelsey's safety should be interpreted as a suspicion that Kelsey was armed and dangerous.

Next, the state argues that the frisk took place at night when it was dark (State's Brief at 14). It was 7:40 p.m. and Officer Gonzalez testified that the street was brightly lit, "Mitchell Street, because it's a business district, has probably the best lighting in that area. So it was a lot better than what residential areas are at night." (32:32).

The state also argues that an inference of dangerousness arose when Kelsey fled (State's Brief at

15). The state maintains that Kelsey's case is like *State v. McGill*, 2000 WI 38, 234 Wis. 2d 560, 609 N.W.2d 795, where this court found that there was reasonable suspicion to suspect that McGill was armed and dangerous after he drove onto a closed street, initially ignored the pursuing squad car, then got out of his car and walked away from the officers. When the officers finally confronted McGill, he was nervous and smelled of alcohol and marijuana.

Arguing that because Kelsey ran away from officers while McGill merely walked, the state claims that therefore there was increased reasonable suspicion that Kelsey was armed and dangerous (State's Brief at 16). This ignores all of the other facts present in the McGill case: the fact that Kelsey was "very cooperative" while McGill was nervous; there were two officers present in Kelsey's case and only one with McGill; the officers were concerned about Kelsey's safety while the officer in McGill's case was concerned about his own safety; and that McGill smelled of drugs and alcohol while Kelsey did not. *State v. McGill*, 234 Wis. 2d at 572.

The state also tries to dismiss the fact that after the officers caught up to Kelsey she was "very cooperative." (32:16). The state says that because the officers could not obtain a satisfactory answer as to why Kelsey ran there was an inference that she ran because she was dangerous (State's Brief at 15). First, running from officers may create some suspicion but not necessarily suspicion of dangerousness and suspicion that she was armed. The officers suspected that she ran because she was a runaway (32:11). When the officers caught up to Kelsey after a brief, 30-40 second chase, "she was asking, why are you messing with me; why are you messing with me, and I was asking her, why are you running? And she said, because she was scared, and I said, what are you afraid of, and she was unable to explain why she was afraid." (32:11-12). Under the circumstances it is not difficult to believe that a 15-year-old girl who has just been chased

by two police officers would not be able to articulate more than saying that she was scared. And it is too great a leap to say that Kelsey's inability to articulate more than her fear translates into a reasonable suspicion that she must be carrying a weapon. People run from police for many of reasons, including mistrust, an outstanding warrant and drug possession. Running, particularly in Kelsey's case, did not lead to a reasonable suspicion that she had a weapon and was dangerous.

Further, Kelsey's run cannot be viewed in isolation. If the run raised a reasonable suspicion that Kelsey was armed and dangerous, then it makes no sense that the officers let Kelsey sit on the hood of the squad car for 20 minutes while they waited for a female officer to search (32:13). Officer Gonzalez testified that he sat in his squad car while they waited, thus leaving Officer Rivera alone with Kelsey (32:16).

In *State v. Mohr*, 2000 WI 111, 235 Wis. 2d 220, 613 N.W.2d 186, the court found it significant that the frisk took place 25 minutes after the traffic stop, "The officer testified that the frisk was done for his safety and because Mohr refused to take his hands out of his pockets, but when this evidence is considered along with the fact that the frisk occurred approximately twenty-five minutes after the initial traffic stop, the most natural conclusion is that the frisk was a general precautionary measure, not based on the conduct or attributes of Mohr." *Id.* at 226.

Finally, the state cites the fact that the officers placed Kelsey in the squad car as a factor supporting the reasonableness of the *Terry* frisk (State's Brief at 17). The critical fact in this case is that the officers did not have to place Kelsey in the squad car. Contrary to the state's assertion, they had no obligation to take Kelsey home. The officers decided to take Kelsey home regardless of whether or not her mother asked them to (32:42).

The state poses the hypothetical question of what would have happened if Kelsey refused to ride in the squad car (State's Brief at 23). As Kelsey pointed out in her brief, the officers had numerous options short of driving Kelsey home in the squad car. They could have asked Kelsey's mother to pick Kelsey up, they could have walked Kelsey home, they could have followed Kelsey as she walked home, they could have asked Kelsey to call a friend or another family member to pick her up. The facts in this case clearly presented the officers with alternatives to placing Kelsey in the squad car. The question of what officers should do if they do not have any alternatives is not posed by the facts in this case. The officers simply had no legal duty to take Kelsey home, especially to take her home in the squad car.

As the state notes, officers have a community caretaker function (State's Brief at 24). However, this function cannot be broadened into officers taking people into their squad cars at will. When an officer who sees a person walking on a bitterly cold night the officer cannot stop that person, search him and place him in the squad car so that he can be safely driven home. A pat-down search cannot be bootstrapped onto an officer's apparent desire to be helpful.

Ultimately, Kelsey and the state agree that this is a fact-driven case that must be decided on reasonableness grounds. The facts in this case are simple: a 15-year-old girl is out alone well before curfew. Because she is a girl and alone the police officers are worried about her. They question her and she answers their questions. When they tell her to "stay put" she runs away scared. Less than a minute later, the officers catch her and call her mother. They decide to take the girl home but first wait, without incident, for 20 minutes for a female officer to arrive and search the girl. Nowhere in these facts does the girl present an element of danger or threat. The officers themselves are unconcerned for their safety with her.

Under these facts, the officers' decision to search Kelsey was unreasonable.

### CONCLUSION

Because the officers lacked reasonable suspicion to stop Kelsey, the seizure of the evidence after the stop was improper and the trial court's denial of the motion to suppress should be reversed. In the alternative, the evidence should be suppressed because the search was not reasonable, did not fit under any of the exceptions to the warrant requirement and a blanket rule in Wisconsin permitting searches prior to transport in squad cars violates the state and federal constitutions.

Dated this 19<sup>th</sup> day of December, 2000.

Respectfully submitted,



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## CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 2,431 words.

Dated this 19<sup>th</sup> day of December, 2000.

Signed:



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